NO. 167

In the Supreme Court of the United States

October Term, 1927

W. C. TUCKER,
Petitioner,

vs.

ACEL C. ALEXANDER,
Collector of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

A writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit was granted herein on March 7, 1927, — U. S. —, 71 L. Ed. 541.

AS TO THE GRANTING OF THE WRIT

In the petition for certiorari three grounds or reasons for granting the writ were assigned.

The first was that the decision by the Circuit Court

of Appeals in this case was in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891 (Petition, p. 19). Since the granting of the writ the decision by the Circuit Court of Appeals in this case has come in conflict with, and has been expressly repudiated as authority by a decision by the District Court for Connecticut in the Second Circuit rendered by Judge Edwin S. Thomas in the case of *Union & New Haven Trust Co.* v. *Eaton,* decided June 2, 1927, — F. (2nd) —. In the opinion in that case, Judge Thomas says:

> "But it is urged that the specified ground for a refund of this amount was not urged in the plaintiff's claim for refund, and that the plaintiff is, therefore, precluded from setting up this ground in this action. I am unable to draw any such conclusion from a study of the statute. Obviously the statute required nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue. In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that whether claimant assigned grounds or not, the statute merely requires that he *file his claim* for refund. To hold, therefore, that a plaintiff is precluded from asserting a reason for refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress. To assert that Congress has the power to impose any condition it sees fit to the grant of a right to sue the sovereign is true enough, but also irrelevant. The

question here is—what is the condition that Congress has actually imposed? The defendant cites and relies upon *Tucker* v. *Alexander,* 15 Fed (2d) 356, and *Red Wing Malting Co.* v. *Willcuts,* 15 Fed (2d) 626, both decided in the Circuit Court of Appeals for the Eighth Circuit. If these decisions interpreted a statute fixing a rate, or determining a duty of a collector, I should, in the absence of any decisions in this Circuit, feel myself constrained to follow them, regardless of my personal views. But a conflict of opinion in the instant case could not constitute a source of embarrassment to administration officials entrusted with the enforcement of the revenue laws. With due deference, therefore, to the judgment of that Court, I find myself unable to accept its conclusions—the more so, as that Court has failed in either case to quote the specific phraseology in the statute upon which it relies."

The conflict indicated between the holding of the Circuit Court of Appeals for the Eighth Circuit and the District Court for Connecticut in the Second Circuit tends to support the action of this Court in granting the writ of certiorari in the instant case, and emphasizes the importance of a decision by this Court which will settle the conflicting decisions of the various inferior federal courts and put the disputed question at rest.

The third ground or reason urged in the petition for certiorari herein was that the decision of the Circuit Court of Appeals decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and departed so far from the

accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Petition, pp. 24-25).

In support of this ground, it was urged by the petitioner that, although the district court had assumed full jurisdiction and tried the case out upon its merits and rendered a judgment against the petitioner thereon, yet the Circuit Court of Appeals held that, because the petitioner's claim for refund of tax filed with the Commissioner of Internal Revenue as a condition precedent to the right to maintain the action was defective and insufficient, the trial court never had jurisdiction to try the cause and render a judgment upon the merits, and for that reason and solely upon that ground, affirmed the judgment as rendered. In other words, the judgment rendered was affirmed on the very ground of want of jurisdiction to render any such judgment.

In the petition for certiorari, no authorities were cited upon this point. Since the granting of the writ the petitioner's attention has been called to the case of *Webster* v. *Fall*, 266 U. S. 507, 69 L. ed. 411, where a similar situation was presented. In that case the trial court heard the case and dismissed the complainant's bill for want of equity and on the merits. On appeal it was held by this Court that because the Secretary of the Interior was not a party to the action in the trial court and was a

necessary party to the determination of the issues therein, the trial court was without jurisdiction to hear the cause and render a judgment on the merits, but should have dismissed the bill for want of a necessary party. Accordingly, it was ordered that the decree of the trial court *dismissing the bill for want of equity should be reversed with directions to dismiss it for want of a necessary party.*

In support of its decision this Court cites *Gnerich* v. *Rutter,* 265 U. S. 388, 68 L. ed. 1068, 44 Sup. Ct. Rep. 532, and *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 34, 41 L. ed. 621, 623, 17 Sup. Ct. Rep. 225.

Following the rule in the foregoing cases, if the Circuit Court of Appeals was correct on the law as to the question of jurisdiction of the district court, then its decision should have been that the judgment of the district court be reversed with directions to dismiss the cause for want of jurisdiction. Therefore, the cases cited support the action of this Court in granting the writ of certiorari in this action on the third ground assigned in the petition therefor.

OPINIONS IN THE LOWER COURTS

No opinion was rendered in the trial court other than its findings of fact and judgment (R. 74-79).

The opinion of the Circuit Court of Appeals is re-

ported in 15 F (2d) 356, under the title of *Tucker* v. *Alexander, Collector.*

THE JURISDICTION OF THIS COURT

The jurisdiction of this Court was invoked by petition for a writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, — Stat. —. The writ was granted as petitioned for and the cause is now here for review and determination under said Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified to this Court for review.

STATEMENT OF THE CASE

This was an action at law begun on October 21, 1924, by the petitioner, as plaintiff, against the respondent, as Collector of Internal Revenue for the District of Oklahoma, as defendant, in the District Court of the United States for the Western District of Oklahoma.

PLEADINGS

The petition, omitting the title thereof and exhibits attached thereto, is as follows:

> "(R.2) Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander, Collector of Internal Revenue, the defendant above named, alleges and says:

"(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

"(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Revenue (R. 3) under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten (fol. 4) days after the date thereof a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true and correct copy of which notice and demand is hereto attached, marked Exhibit A, and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 20, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit B, and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

"(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 150 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed *in specie* to its stockholders by a liquidating dividend; that the net (R. 4) actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired, and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and (fol. 5) illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed

*Corrected to $203.71 by a trial amendment allowed by the Court with consent of the defendant (R. 45). By mistake the original figures instead of the amended ones appear in the transcript of the Record.

at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his income tax returns for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation as a deduction from income, but included said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggerated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

"(4) That on the 2nd day of November 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit C, and made a part hereof; and that (R. 5) more than six months have elapsed since the filing of said claim with the said Commissioner and he has not rendered a decision thereon.

"Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84 with interest thereon at the rate of 6 per cent per anum from the 30th day of October, 1923, and the costs of the action."

Exhibit C to the peteition (R. 6-7), being the claim for refund referred to, was made upon the printed form prescribed and provided for that purpose under regulations established by the Secretary of the Treasury pursuant to law and contained the following statement of the grounds upon which the claimant believed the refund of tax should be allowed:

> "That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT:PA:Fr-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment."

That part of the petitioner's appeal to the Commissioner which is expressly referred to above and adopted as a part of his claim for refund is in the following lan-

guage, taken from a letter of the Commissioner to the petitioner under date of April 24, 1925, and introduced in evidence as plaintiff's Exhibit 5 (R. 54-55):

> "(R. 54) The proposed assessment of additional tax is based upon a revenue agent's report under date of June 5, 1922, and transmitted under date of June 17, 1922. In that report the revenue agent has charged the taxpayer with a profit derived from the liquidation of the Osage Mercantile Company in 1920 in the sum of $19,230.84. This amount is set up as additional income and the larger part of the proposed additional tax rests upon this item.
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> "The taxpayer says that said revenue agent's report is erroneous, (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis (R. 55) for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation the full amount of its outstanding liability, and (3) in that he did not take into account in reduction of the value of the assets of said company at liquidation its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the revenue agent's report."

On February 9, 1925, the defendant filed his answer of general denial to the petition in the following language:

> "(R. 6) Comes now the defendant above named and for answer to the petition of the plaintiff herein denies each and every allegation therein contained."

The cause was tried in June, 1925, before the Court

without a jury, the parties having waived a trial by jury by a stipulation in writing filed in the cause.

OPENING STATEMENT OF ATTORNEYS

The issues and the facts in the case are fairly stated in the opening statements of counsel. Mr. Floyd F. Toomey, for the defendant, by consent, made his opening statement first as follows:

> "(R. 7) This is a case where the Osage Mercantile Company, a corporation at Pawhuska, was organized in 1902. The plaintiff in this case is a stockholder, and he was, I think, from the beginning of that corporation to its liquidation in 1920, and the tax involved here is an individual tax of a stockholder in the Osage Mercantile corporation. The corporation continued in existence until 1920, at which time it dissolved and liquidated, and the assets of the corporation—I might say from 1914 on I believe the Osage Mercantile Company was owned by two stockholders, W. C. Tucker, the plaintiff in this case, and his brother. In 1920 they dissolved the corporation, and W. C. Tucker and his brother continued business as a partnership, the Osage Mercantile Company, continued it at the same place, same (R. 8) business and under the same name and same management. The tax question arises in this way: It is the determination of the taxable income received by W. C. Tucker, one of the stockholders of this corporation, by having received his partnership share of the liquidated assets of this corporation. The case really arises I think under Section 201 and subdivision (c) of the Revenue Act of 1918, which provides (fol. 12) that amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares and shall be taxed

to the distributee the same as other gains or profits. Now that section of the law simply throws it over into the general proposition, that is, where a taxpayer had assets prior to March 1, 1913, the effective date of the 16th Amendment, which he sells or converts subsequent to March 1, 1913, the taxable gain is the difference between the value of the property on those two dates, so in this case the disputed question involved is: What is the net taxable income of W. C. Tucker arising out of his receiving his proportionate share of the liquidated assets of the Osage Mercantile Company in 1920? And to arrive at that we have to arrive at it as of March 1, 1913, the value of those assets, and subtract that from the value of those assets at the date of liquidation in 1920. Now, that is very simple, but the legal question in this case, the big legal question, is the proper means of arriving at that March 1, 1913, value, and the evidence will be something like this, in order to get the controversy clearly before the court. On March 1, 1913, the assets of this Osage Mercantile Company or corporation were divided really into two corporations, or parts. There was a mercantile business proper and real estate. I think the evidence will show the value of these two parts of the business were about equal. On May 8, 1913, three months later, they take out of the business and take away from this Osage Mercantile corporation all of its real estate and transfer it to a newly formed corporation. I think it was done in order to comply with the Oklahoma laws prohibiting a mercantile company from holding real estate. Now, in arriving at the March 1 value of the assets of this corporation, we have deducted the value of this real estate feature of the business which was taken away from the corporation, and that is practically the only legal question in (R. 9) this case, viz., whether or not in arriving at the March 1 value of this corporation's assets, the Government proceeded properly in de-

ducting from that value [the value] of the real estate which was taken away from the corporation three months later. This real estate was transferred over and they called it the Mercantile Real Estate Corporation. This continued in existence and is in existence today, owned by the same stockholders in the same proportion to their holdings in the Osage Mercantile Company. The mercantile company liquidated in 1920, but the real estate company continued in existence, so what they did was to liquidate just the mercantile feature of the business, and they are seeking (fol. 13) in determining the taxable gain to be derived from that liquidation to take away from it [the assets liquidated] the real estate of the mercantile company as of March 1, 1913, which we contend would be allowing them a double deduction. It would be allowing them to take out in 1920 something of the business which they still have. That, roughly speaking, is our position."

Thereupon counsel for the plaintiff made his opening statement as follows:

"(R. 9) The statements of Mr. Toomey, I think, are in the main correctly made, but there are a few matters he is in error on. In the first place, in 1913, the stockholders were some seven or eight in number, Mr. Ferguson, Mr. Hutchins, Mr. Mosier, Mr. Mathews, and the Messrs. Tucker, two of them. Mr. Mosier's stock was disposed of in 1914. The other stockholders held their shares until 1920. It never passed into the entire ownership of Messrs. Tucker until in 1920. The real estate in 1913 was just a little more than one-third of the value of the assets of the corporation as shown on their books. It was perhaps two-fifths of it as shown on their books. Now, about May in 1913 this real estate was distributed in the form of a dividend, the facts being that it was transferred to another corporation known as the

Mercantile Real Estate Company and charged off the books of the Osage Mercantile Company as a dividend to stockholders. The stock in the (R. 10) Mercantile Real Estate Company was issued to the stockholders of the Osage Mercantile Company in the same proportion as their stockholdings in the latter company. I think the Mercantile Real Estate Company is still in existence, perhaps, with some changes in stock ownership; at least one of the stockholders died. Now, it is the contention of the plaintiff that this distribution of real estate was a dividend at that time and declared out of accumulations prior to March 1, 1913. There were also some cash dividends declared in the early part of 1913 out of earnings prior to March 1 of that year. They amount to a little over $5,000, about $5,800. There was $9,000 in dividends declared up to May of that year, but part of that, or about half of it, was paid out of current earnings, and the amount as set up in the revenue agent's report on which additional tax was assessed is about $5,800 paid out of the previous earnings. Now the tax involved here is an (fol. 14) additional assessment that was paid in the fall of 1923 in the sum of $8,610.84. The evidence will show the taxpayer, Mr. Tucker, in making his return in 1921, showed his income as he claimed it exclusive of any profit in the liquidation of the Osage Mercantile Company. The Collector on his return stated that the tax was erroneously calculated, in that the earnings of the partnership were listed as dividends of a corporation and were not subjected to the normal tax of 8 per cent. If they had been dividends, they would not have been subject to this tax, but being earnings in a partnership, as the facts were, they were subject to the tax. That made an additional tax liability of $1,968.71. The tax shown and paid on his return was $5,172.93, so that his true tax liability on his return was $7,141.63. The total tax payments, the first assessment and the additional assessment aggregated $13,783.76, and deducting the

admitted tax liability of plaintiff from that, makes $6,642.13, which is the amount in controversy here. That is the maximum amount of recovery with interest from date of payment, which is October 30, 1923. Now the claim for abatement and refund was duly filed, and after this suit was filed in April of this year, the Commissioner wrote a letter to the taxpayer, stating he was allowed a refund of $216 and some cents, and we take it that is the minimum of recovery which the taxpayer is entitled to.

"(R. 11) In regard to the amounts distributed in the dividends [in 1913], it is the contention of the plaintiff that those dividends cannot be used to reduce the March 1 value of the stock. They cannot be treated as liquidating dividends, the corporation continuing in business, the same officers at the same place and continuing a profitable business down to July, 1920. If on the other hand, as stated by counsel—this indicates to me a new angle in the case—I had not known of that position until counsel stated it—if it is to be considered that this real estate was not actually a dividend, only just a transfer of the property to the same persons in another form, to form another corporation, and they are deemed as still holding it, then in that event it cannot be taken into account as having been realized upon, and they cannot be charged with having received the value of that real estate in the liquidation of the March 1 value of the stock, so I take it on either view of the nature of that real estate distribution that the proposition of law we contend for would be the same, viz., that that was not a realization at all of March 1 value.

"The remaining question will be as to good will. This corporation earned quite large profits in proportion to (fol. 15) its capital. Organized in 1902, it started with $15,000 capital in 1902. In 1906 that was increased by a stock dividend to $30,000.00, a hundred per cent dividend being declared, and its

[annual] earnings from the period of its organization to March 1, 1913, on a capital of $30,000.00 for the entire period would exceed 50 per cent, taking into account appreciation in value of the real estate. It is claimed it had a good will value then and that it had a good will value at the time of liquidation. The evidence may show those good will values were substantially the same, but it will be contended for the plaintiff that good will is not an asset that can be distributed to stockholders in liquidation of a corporation and they made chargeable with the value of it—that when a corporation liquidates its good will may not be sub-divided among its several stockholders, whether they be two or more, and be treated as having been received by them in liquidation. This was a liquidation and distribution in kind. The assets were not sold, but were taken over by the stockholders, consisting of merchandise, furniture and fixtures and so forth, and not converted into cash and distributed, but it was distributed *in specie* or in kind. I think that covers the plaintiff's contention."

FACTS SHOWN IN EVIDENCE

Thereupon the evidence for both parties was introduced and heard. There was no controverted question of fact developed on the trial. The facts disclosed by the evidence may here be stated briefly in narrative form.

In the year 1902 a corporation known as the Osage Mercantile Company was organized with a capital stock of $15,000,00 to engage in the mercantile business at Pawhuska, in Osage County, Oklahoma. In 1906 a stock dividend of 100% was declared from earned surplus. This gave it a capital stock of $30,000, divided into 300 shares

of $100.00 each which was never increased. Prior to March 1, 1913, petitioner became the owner of 150 shares of its stock. These he owned continuously to July 20, 1920, at which time the corporation was liquidated and dissolved.. He and his brother, R. W. Tucker, at that time owned all of the capital stock, each owning 150 shares. The petitioner made return of his income for taxation for 1920 under the Revenue Act of 1918. He computed the tax due on the income shown on his return and paid the same in the sum of $5,172.92, but he afterward learned that because of an error in computation, this sum was $1,968.71 too small (R. 48).

Thereafter a revenue agent in the field service of the Department of Internal Revenue made an investigation of his income tax liability for 1920 and reported him for an additional tax of $8,610.84. This additional tax was assessed, and on October 30, 1923, after notice and demand by the respondent was paid under protest. On November 2, 1923, he filed with the Commissioner of Internal Revenue a claim for refund of additional tax paid. This claim was held without action on the part of the Commissioner until April 24, 1925, when it was allowed for the sum of $216.26 only, and rejected for the balance. The amount of refund so allowed was not paid (R. 55). On October 21, 1924, the petitioner commenced this action against the respondent as Collector to re-

cover the said sum of $8,610.84 additional tax paid. Issues were joined on February 9, 1925, by the filing of a general denial by the respondent and trial was had on June 12 and 13, 1925. On the trial the petitioner admitted that he had made an error on his tax return in the computations of his tax by reason of which the amount of tax originally paid was too small in the sum of $1,968.71, and that, therefore, that amount of the additional assessment was correctly and justly assessed and collected (R.48), leaving the amount in controversy, which he sought to recover, only the sum of $6,642.14, with interest (R. 55-56, 64).

The additional tax assessed and in controversy was based on an alleged gain or profit realized by petitioner from his corporate stock in the Osage Mercantile Company upon its liquidation in 1920 over its fair market value on March 1, 1913. The Commissioner claims, the petitioner agrees, and the trial court found that the fair market value of the stock on March 1, 1913, based on its book value or the value of the tangible assets of the corporation, was $356.86 a share. Thus the corporation then had an earned surplus of $256.86 a share, or a gross sum of $77,058.00

This value did not include any good will or going concern value attaching to the corporation's business.

A substantial part of its assets at that date consisted of real estate in the City of Pawhuska, Oklahoma, the bulk of which was acquired in 1906 at what was known as the Government Town Lot Sale. The cost of the real estate was $50,150.00 and it was still carried on the corporation's books at that figure, notwithstanding it had increased largely in value since its purchase. There was mortgage indebdness against it of $10.000.00 for part of its purchase price, leaving its net book value $40,150.00.

After March 1, 1913, and shortly prior to May 13, 1913, the stockholders of the company, acting apparently on the belief that the laws of the State of Oklahoma prohibited a mercantile corporation from owning and holding real estate, formed a new corporation known as the Mercantile Real Estate Company with a capital stock of $15,000.00. All of the stock in the new corporation was subscribed for by the stockholders of the old one in the same proporation as their stockholdigs therein. Each subscriber issued his personal check to the new corporation for the amount of stock subscribed for by him. These checks totaled $15,000,00. The new corporation thereupon paid over this $15,000.00 to the old corporation in consideration for the transfer by the old to the new of all the real estate of the old, subject to the mortgage indebedness of $10,000.00 thereon, which the new assumed. Thereupon the old corporation declared and paid by

checks a dividend which included this $15,000.00 received for its real estate.

There was some confusion in the minds of the three stockholders in both companies who testified at the trial as to just how the transaction of the transfer of the real estate from the old corporation to the new was handled. Mr. R. W. Tucker first testified that dividend checks of the Osage Mercantile Company for $15,000.00 were issued to its stockholders, and they then turned these checks to the Mercantile Real Estate Company in payment for its stock and it then turned them to the Osage Mercantile Company in payment for the real estate(R. 37-38). On cross examination he stated that the subscribers to the stock of the Mercantile Real Estate Company gave their checks to it and then it turned these checks to the Osage Mercantile Company for the real estate and then the Osage Mercantile Company paid the amount back to its stockholders in the form of dividend checks (R. 38-39).

Mr. G. W. Hutchins stated that it was a stock dividend, as he understood it, that is, that the stockholders got their stock in the new corporation as a dividend from the old one. His recollection was that the stock in the new was transferred to the old in exchange for the real estate, and was then distributed by the latter to the stockholders. He did not remember whether checks were

issued or not, but knew that he got his stock in the new corporation without the payment of any money and took it as a dividend from the old one (R. 40-41).

The petitioner testified first that the real estate was deeded by the old corporation to the new and the value thereof charged to undivided profits, the same as other dividends, and credited to the real estate account, and that the stockholders in the old corporation received stock in the new in the same proportion as their stockholdings in the old (R. 15-16). Again he stated the transaction was simply that the real estate was deeded to the Mercantile Real Estate Company and its stock was issued to the stockholders (R. 23-24). Later in his testimony, upon examination of the books and records of the Osage Mercantile Company, he testified that the stated consideration paid by the new corporation to the old was $25,000.00, of which $15,000.00 was paid by check and $10,000.00 by assuming the indebtedness of that amount on the real estate. The $15,000.00 thus received by the old corporation was placed with $3,000.00 of other funds, and this $18,000.00 was paid out to its stockholders in a dividend. The remaining balance of $25,150.00 in the real estate account was charged to undivided profits as a loss (R. 59-64).

Mr. S. O. Dye, the Revenue Inspector who made the

investigation and report upon which the tax in controversy was assessed, testifying for the respondent, stated that, while the books of the old corporation showed the transfer of the real estate as a sale, he considered it a gift from the old corporaiton to the new, because it was conveyed at $25,150.00 less than its book value, which was less than its actual value, and this sum was charged off as a loss, and because the stockholders in the new corporation owned the stock in the same proportion as they owned the stock in the old, and because the two corporations later made a consolidated return and claimed a paid in surplus for the new one. He gave his opinion that the transfer of the real estate was not a dividend (R. 67-69).

The finding of the court was that the stockholders in the new corporation paid it their checks for its stock, and that it then paid over the amount of these checks in the sum of $15,000.00 to the old corporation in payment for the real estate, and that the old corporation then declared a dividend of the same $15,000.00 back to its stockholders (R. 76).

After the transfer of the real estate the old corporation continued its mercantile business just as the same had therefore been conducted until its liquidation on July 20, 1920 (R. 17-18). The new corporation was still in

existence at the time of the trial and still owned all, or nearly all, the real estate in question, and the petitioner still owned all the stock in it which he acquired at its organization in the manner above stated (R. 46).

During the period between March 1, 1913, and May 14, 1913, the Osage Mercantile Company declared and paid cash dividends out of its surplus or accumulated profits at March 1, 1913, in the sum of $5,796.53 (R. 15-16). The total cash dividends paid during this period, excluding the real estate transaction from consideration entirely, was $9,000.00, but all of that sum in excess of $5.796.53 was paid out of earnings subsequent to March 1, 1913. The total amount of surplus or accumulated profits on hand at March 1, 1913, distributed in dividends and by conveyance of the real estate was $45,946.53 or $153.15 a share (R. 15-16, 77). This distribution left the corporation with its capital unimpaired and with a surplus of more than 100 per cent, its assets being of the exact value of $203.71 a share.

The petitioner made return of his income for 1913 for taxation under the Revenue Act of 1913, as well as for all subsequent years under that and subsequent Revenue Acts (R. 18).

The Commissioner, in determining the gain realized by the petitioner at liquidation of the corporation, de-

ducted the above sum of $153.15 a share from the March 1, 1913, value of his stock, treating the same as a liquidating dividend received at that time. This deduction reduced the March 1, 1913, value of the stock to $203.71 per share. The amount realized by the petitioner on his stock at liquidation of the corporation in 1920 was $319.46 per share. Then by deducting the reduced March 1, 1913, value of $203.71 per share from the above amount realized in liquidation, a profit or gain of $115.75 a share was shown. Upon this profit per share on 150 shares the additional tax in controversy was assessed by the Commissioner. The $216.26 of refund shown to be due by the Commissioner's letter of April 24, 1925, resulted from the fact that the Revenue Inspector in his report upon which the Commissioner made the assessment, had through error not allowed a sufficient deduction from the assets of the corporation distributed at liquidation in 1920 to cover its outstanding tax liability, both Federal and State, then unpaid and undetermined. When the amount of this outstanding tax liability was finally determined, it was found to be larger than the allowance therefor in the Revenue Agent's report (R. 19, 22). This tax had to be and was paid by stockholders out of the assets of the corporation received at liquidation (R. 18). Payment of it reduced the alleged gain of the petitioner on his stock at liquidation and thereby made the amount of

the additional assessment against him excessive by $216.-26, according to the Commissioner's own theory and figures (R. 55).

The court approved and adopted the theory and method of the Commissioner in determining the petitioner's gain on his stock and held that the additional tax in controversy was rightly assessed and collected, except as to the $216.26 of refund admitted to be due. As to this refund, however, he declined to give the plaintiff judgment. The reason assigned was that the claim for that amount had been allowed and would be paid in due course by a Treasury check. Judgment was accordingly rendered for the defendant for costs, without prejudice to the plaintiff's right to receive the refund of $216.26 (R. 78).

At liquidation of the Osage Mercantile Company, the petitioner and his brother, R. W. Tucker, owned all its stock, each owning one-half. The assets of the corporation were not sold, but were distributed *in specie* or in kind in a liquidating dividend to the two stockholders, each receiving one-half of them. Then they formed a partnership and put the former assets of the corporation, which consisted of furniture and fixtures, merchandise, accounts. etc., into the partnership for its capital and continued to conduct the same kind of business at the

same location under the name of the Osage Mercantile Company, a partnership. They did not acquire the ground and building in which the business was located and which the corporation owned at March 1, 1913, because that had been transferred in the real estate transaction in May, 1913, to the Mercantile Real Estate Company.

The evidence conclusively showed that stock in the Osage Mercantile Company had a good will value of at least $100.00 a share on March 1, 1913. Five witnesses, including the petitioner, testified to this or a higher value at time. The evidence also fairly shows that substantially the same good will value attached to the stock at liquidation of the corporation in 1920, although several of the witnesses were of the opinion that it was less than in 1913 (R. 20-21, 25, 32, 35, 36, 42).

The court declined to make a finding of the value of the good will at March 1, 1913, or at July 20, 1920, but found that whatever good will the corporation had on March 1, 1913, it also had on July 20, 1920, and that the same inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the partnership enterprise and was enjoyed by the partners, who were the sole owners of the corporation's stock at dissolution, and further found that whatever good will value attached to the stock on

March 1, 1913, likewise attached to it on July 20, 1920, and, therefore, if existent, would not in any way affect the taxable gain derived by the petitioner upon liquidation of the corporation (R. 77-78).

During the trial counsel for petitioner asked leave to amend the petition by changing the figures which it was alleged the Commissioner erroneously, wrongfully and illegally assumed and took as the fair market value per share of the petitioner's stock on March 1, 1913, from "$356.86" to "$203.71." Counsel stated that he had intended to ask leave to make such amendment before the trial started, but overlooking doing so. Counsel for the respondent stated he had no objection to the amendment. Thereupon the court made the following ruling.

> "(R. 45) By the Court: You can make the amendment. It is a mistake of what valuation the Commissioner put on the stock at that date."

But the amendment figures do not appear in the petition as set out in the Record. Either there was a failure to make the actual physical change of the figures in the original petition after the amendment was allowed, or by mistake the original unchanged figures were used in transcribing the petition for the Record. Counsel for the petitioner did not discover that the amended figures did not appear in the petition as set out in the Record until after the decision by the Circuit Court of Appeals.

It is assumed that since the trial court expressly allowed the amendment and the case proceeded on the theory that it had actually been made, this court will consider it as actually made. There is no controversy over the fact that the Commissioner took the actual March 1, 1913, book value of the stock, which was agreed to be $356.86 a share, and reduced this value to $203.71 a share by deducting dividends declared and real estate distributed between March 1, 1913, and May 14, 1913, out of surplus existing at March 1, 1913, and then took this reduced value of $203.71 a share from the amount realized per share by the petitioner at liquidation in 1920 to measure his gain per share in the latter year. The correctness of this is what the petitioner challenges.

The petitioner put in evidence as Exhibit 4, without objection, a carbon duplicate, executed on the prescribed printed form, of the claim for refund which he filed with the Commissioner prior to suit (R. 51-53). He also put in evidence as Exhibit 5 the letter received by him from the Commissioner allowing his claim to the amount of $216.26 and rejecting it for the balance (R. 54-55).

No question of the sufficiency, either in form or substance, of the claim for refund as a basis for the recovery of the tax upon the grounds alleged in the petition and shown by the evidence, was raised by the re-

spondent. Objection that the grounds for refund stated in the claim did not conform to the petitioner's cause of action as set forth in his petition, or as disclosed by the evidence upon the trial, was not raised, considered or decided by the trial court. Proof of filing of the claim was made by the petitioner as a mere formal matter to show that it had in fact been filed with, and held without action by the Commissioner more than six months prior to the commencement of the suit, in order to meet the requirement of the statute in that regard. Both parties and the court assumed, without question, discussion or consideration, that the claim for refund was legally sufficient, and that the case was to be heard and decided upon the issue of whether the tax in dispute was rightfully and legally exacted from the petitioner, or was wrongfully and illegally exacted from him.

The only question presented was as to the determination of the true March 1st value of the petitioner's stock, which was to be taken as the cost thereof to him, and deducted from the amount which he received upon liquidation of the corporation in 1920, taken as the sale price thereof, to measure his gain, if any, in that year. Nor was there any dispute as to the actual value of the stock on March 1, 1913, disregarding for the moment the question of good will value, nor any dispute as to the

value of the property consisting of money and real estate distributed to the stockholders of the Osage Mercantile Company in May, 1913, out of surplus accumulated prior to March 1, 1913. The sole question presented in this particular was one of law as to whether or not this distribution from March 1, 1913, surplus should be deducted from the March 1, 1913, value of the stock before such value was deducted from the amount realized by the petitioner on his stock in 1920, to determine the resulting gain to him upon such realization, or should be regarded merely as a current dividend from earnings, just as the many other dividends during the years from 1913 to 1920 were regarded, and as not affecting the March 1, 1913, value as cost of the stock for the purpose of determining gain realized in 1920.

That this is true is clearly shown by the following stipulation made by counsel for the parties upon the trial:

> "(R. 64) Mr. Toomey: I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out, based upon the net worth of the corporation was $356.86 per share. That is the figures used by the Revenue Agent. It is also agreed that if the Government is correct in reducing that March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced

$153.15, leaving a net March first value per share of $203.71. I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share. That if the Court should hold that the Government is wrong in its method of computing the March first, 1913 value, hold we are wrong entirely, that the plaintiff is entitled to judgment for $6,642.13, the maximum amount of the recovery will be only $6,642.13. The correct means of treating the $216.26 will be reserved for the determination of the Court.

"Mr. Garnett: It is understood that if the Government is wrong as counsel has stated as to the handling of the dividends the amount refunded of taxes will be $6,642.13.

"Mr Toomey: Yes, sir.

"(R. 65) Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the tax-payer is entitled to will not be included in the judgment, then that would be deducted from the total amount so refunded.

"The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on good will value shown to have existed March first, 1913, and also existed at July, 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation."

MOTIONS FOR JUDGMENT

At the conclusion of the evidence the petitioner filed his motion in writing for judgment in his favor in the following language:

"(R. 73) Comes now the plaintiff above named at the conclusion of all the evidence in the case and moves and asks the court to render judgment in his favor upon the evidence in the case and the law applicable thereto, for the sum of $6,642.13, with interest thereon at the rate of 6% per (R. 74) annum from October 30, 1923, or the total sum at this date of $7,289.73 and for the costs of this action."

The respondent filed his motion in writing for the dismissal of the plaintiff's petition and for costs (R. 74).

FINDINGS AND JUDGMENT

Thereupon, the Court overruled the petitioner's motion and sustained the respondent's motion and made his findings and judgment in the form of a journal entry which was duly entered in the cause (R. 74-79). This judgment is as follows:

JUDGMENT OF THE COURT

"(R. 74) This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May 1925 Term of the above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A. Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the (R. 75) close of the day, court re-

cessed and the trial of the cause was continued to 9:00 o'clock a. m. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

"Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with interest thereon at the rate of six per centum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

"Thereupon the cause was argued to the court, and the court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63, and that of the additional tax assessed against

him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assesesment to have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March (R. 76) 1, 1913, and which he realized upon in liquidation of said corporation on July 20, 1920; that the assets of the corporation were not sold at liquidation, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a co-partnership, the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913, the assets of said corporation consisted of the mercantile business proper, including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation known as the Mercantile Real Estate Company, with a capital stock of $15,000.00 was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholdings in the old corporation; that said stock-

holders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence, and the plaintiff still owns the stock which he acquired in it at its organization as above stated; that during the period between (R. 77) March 1, 1913, and May 14, 1914, the Osage Mercantile Company declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of the real estate so transferred to the Mercantile Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividends to the extent of $5,796.53, distributed between March 1, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was as-

sessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

"The court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913, value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that therefore, the additional tax assessed by the Commissioner of Internal Revenue, with the exception of the sum of $216.26, above referred to, was properly and legally assessed, collected and paid.

"The court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913, was also enjoyed by the company at the time of its dissolution on (R. 78) July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; that any good will value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

"The court, therefore, finds the issues generally for the defendant, and further finds that since the

Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

"The court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the plaintiff at the time excepted and his exception is allowed.

"It is therefore, considered, ordered and adjudged by the court that the motion of the plaintiff herein for judgment in his favor be, and it is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and it is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and adjudged (R. 79) against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed by the Commissioner of Internal Rev-

enue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

"Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty days from this date in which to make, serve and file his bill of exceptions herein."

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS

Thereafter such steps were taken and proceedings had by the petitioner that the cause was brought by writ of error before the United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, in the State of Missouri. In said Court the plaintiff in error therein, plaintiff below and petitioner here, made the following assignments of error occurring in the trial court.

ASSIGNMENTS OF ERROR.

"(R. 80) 1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for a judgment in his favor made at the conclusion of the evidence on the trial.

"2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below, for a judgment in his favor made at the conclusion of the evidence on the trial.

"3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in

refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of said corporation on July 30, 1920.

"4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

"5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

"6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest (R. 81) thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

"7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six per centum per annum from October 30th, 1923, and for costs of the action.

"8. The court erred in rendering judgment for the defendant in error for costs.

"9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

"10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

"11. The court erred in that its judgment is contrary to law."

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

The cause was duly briefed, argued and submitted for decision in the Circuit Court of Appeals, and on October 27, 1926, that Court rendered its decision affirming the judgment of the trial court. In its decision the Circuit Court of Appeals did not consider any of the assignments of error made by the petitioner but considered only the question, raised for the first time in the respondent's brief in that court, of the conformity of the grounds for refund of the tax alleged in the petitioner's claim for refund to those alleged for its recovery in his petition in the suit and as disclosed by the evidence. This question had never been raised in, nor called to the attention of, nor considered by, the trial court, and no action of the trial court upon such question is disclosed by the record. Upon this question the Circuit Court of Appeals held that an action for recovery of income tax could not be based on any ground other than those presented in the claim for refund filed with the Commissioner as a condition precedent to the right to maintain the suit, and further held that in the instant case the grounds relied upon in the petition in the suit were entirely different from those contained in the claim for refund.

While not expressly so stated in the opinion, it is evident that the Circuit Court of Appeals treated the

question of the sufficiency of the claim for refund as a basis and support for the suit as a jurisdictional one, and, therefore, properly raised for the first time in that court, as a court of review.

Having reached the conclusion that the petitioner's claim for refund was insufficient to support his petition in the suit, the court held that the judgment of the trial court against his right to recover the tax was correct and should be affirmed. Accordingly it rendered a judgment affirming the judgment of the trial court (R. 87).

OPINION OF CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals appears at pages 83 to 87 of the Record, and is in full as follows:

> "(R. 83) Stone, Circuit Judge. This is an action for refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the department, thereafter, resulted in an additional assessment, which was paid under protest. (R. 84) In due time after this last payment, plaintiff filed his claim for refund. After waiting 17 months, in vain, for some action thereon by the department, this action was brought. About six months after this action was begun and before trial thereof, the department made an allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant, but without prejudice to acceptance by

plaintiff of the allowance of $216.26, this writ of error is sued out.

"In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

"Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Okla. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a copartnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to the date of liquidation in 1920.

"There are two main contentions here. One is of minor importance, concerning costs herein.

"The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

" 'That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000 divided into 150 shares of the par value of $100 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000 divided into 300

(R. 85) shares of the par value of $100 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders.'

"The collector contends that the plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

*Corrected by trial amendment to $203.71 (see R. 45).

"'The taxpayer says that said revenue agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation, the full (R. 86) amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the revenue agent's report.'

"It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the claim for refund. Hence, the above point raised by the collector must be determined. We think the collector is right for the reasons following:

"This is a suit against the government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Internal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the commis-

sioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

"(R. 87) The minor claim affects only costs and arises out of the fact that the commissioner allowed a refund of $216. The tax was paid, under protest, on October 30, 1923; the claim for refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the statute, six months after the claim was filed within which to determine the claim and within which time plaintiff could not bring suit. As the commissioner did not act within that period, the plaintiff was within his rights in bringing suit. If he had based his suit upon any ground contained in the claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

"The judgment should be and is affirmed."

Motion of the petitioner for a new trial in the Circuit Court of Appeals was filed and overruled (R. 89). Thereupon, petition for a write of certiorari was lodged by the petitioner in this court and on March 7, 1927, the same was granted (— U. S. —, 71 L. Ed. 541), and the cause duly brought before this court for review upon certiorari.

ASSIGNMENTS OF ERROR

As to the Decision of the Circuit Court of Appeals

The petitioner here assigns the following errors in respect of the decision and judgment of the Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in holding that a claim for refund of tax, stating in general terms only the grounds upon which a refund was claimed, was legally insufficient as a claim and would not support a subsequent suit to recover the tax.

2. The said Court erred in holding that the petitioner could not rightfully assert in his petition in the suit, nor base his recovery upon, any ground for repayment of the tax which was different from the grounds asserted in his claim for refund filed with the Commissioner prior to the suit.

3. The said Court erred in holding that the grounds

relied upon in the petition in the instant case were entirely different from those set out and relied upon in the claim for refund.

4. The said Court erred in holding that the sufficiency of the grounds alleged in a claim for refund of tax to constitute a foundation for, and give the right to maintain, a subsequent suit for the recovery of such tax is a jurisdictional question and is not waived by not being raised in the trial court, but may be raised for the first time in a court of review.

5. The said Court erred in holding that, although in the instant case the trial court had no jurisdiction, because the claim for refund was fatally insufficient and defective, to determine from the facts alleged in the petition and shown by the evidence whether the tax in controversy was illegally exacted from the petitioner or not, still that court's judgment that such tax was not illegally exacted should be affirmed on the ground of such lack of jurisdiction.

As to the Judgment of the Trial Court

The assignments of error in respect of the judgment of the trial court, already set forth above, may be grouped and considered under four specifications as follows:

1. The trial court erred in holding as a matter of

law that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.46 paid out of surplus accumulated prior to March 1, 1913, were to be excluded from assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as the cost basis for determining the gain realized by the petitioner upon his stock at liquidation of the latter corporation in 1920.

2. The trial court erred as a matter of law in not rendering judgment for the petitioner for the amount of $6,642.13 with interest thereon at the rate of 6% per annum from October 30, 1923, and the costs of the action.

3. The trial court erred in holding as a matter of law that whatever good will value was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders upon the distribution of its tangible assets to them in kind.

4. The trial court, having refused a judgment for the petitioner for $6,642.13 and interest, erred as a matter of law in not entering judgment for him for at least the sum of $216.26 which the Commissioner by letter admitted to be refundable, with interest at 6% per annum from October 30, 1923, and the costs of the action.

BRIEF AND ARGUMENT

The Decision of the Circuit Court of Appeals

First Assignment of Error

This assignment presents the question of what is required to be stated in a claim for refund in order for it to constitute a valid claim within the meaning of the statute providing that a claim for refund shall be filed before any suit or proceeding shall be maintained for the recovery of any Internal Revenue tax. The applicable statutes in force at the time the petitioner's claim for refund was filed are Secs. 3220 and 3226, Revised Statutes, as amended by Secs. 1315 and 1318, Revenue Act of 1921, as follows:

> (Sec. 3220 as amended) "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected * * *."
>
> (Sec. 3226 as amended) "No suit or proceeding shall be maintained in any court for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pur-

> suance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty or sum."

Under this latter section the Circuit Court of Appeals assumed that a claim for refund that stated the grounds on which the refund was sought in general terms, such as merely that the tax was erroneously and illegally assessed and collected, was not a sufficient compliance with the statute and that such a claim was in legal effect no claim at all and hence afforded no basis for a suit in court to recover the tax.

As to this holding, it will be observed that the statute contains no intimation or requirement as to the contents of the claim. Its language is merely that before a suit can be maintained for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, a "claim for refund" must have been filed with the Commissioner in conformity to the provisions of law and the regulations of the Secretary of the Treasury. There is no other provision of law as to what shall be the form or contents of the claim for refund. The only regulation established by the Secretary of the Treasury in force at the time the petitioner's claim for refund was filed is contained in Art. 1036, Regula-

tions 45, and the pertinent part thereof reads as follows:

> "Claims by the taxpayer for the refund of taxes and penalties erroneously or illegally collected shall be made on Form 46. In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. It should be accompanied by the collector's receipt or the cancelled check showing payment of the tax."

The number of the form prescribed in the regulation quoted was changed from 46 to 843 prior to the filing of the petitioner's claim in November, 1923.

From the foregoing it appears that neither the statute nor the regulations prescribed by the Secretary of the Treasury required the claim for refund to state more than that the tax was erroneously or illegally assessed and collected. The regulation does go further on the subject of proof, but not upon the subject of the statement of the claim. It provides that the burden of proof rests upon the claimant and that the facts relied upon in support of his claim shall be stated under oath, but not that such facts shall be stated and embodied in the claim itself. Ordinarily the phrase, "facts relied upon in support of the claim," would mean the evidence to support the general averments of the claim, and would not mean the facts necessary to be alleged to constitute the claim

itself. This is in accord with the rules of good pleading. It is elementary that a pleader should allege only the general or ultimate facts which constitute his cause of action, and should not plead primary facts which are merely evidence of the general or ultimate facts alleged. At common law the common counts, merely alleging money paid by the plaintiff for defendant's use and money had and received by defendant for plaintiff's use, were a sufficient pleading and stated a good cause of action in assumpsit. 2 Bouv. Law Dict. 369. It is true they were generally coupled with one or more special counts in which the facts were more particularly pleaded, but a declaration containing the common counts was good upon a general demurrer. In respect of a claim for refund it would seem that a statement, in the language of the statute, that it was for a tax erroneously and illegally assessed and collected, would be a legally good and sufficient claim. It might be that it would be of advantage to a claimant for the better consideration of his claim to plead a more detailed statement of the grounds relied on, or that the Commissioner might request that the claim be made more definite and certain by stating particulars, so that he might more intelligently consider it. But if this were not done, it would seem that objection to the claim because couched in general terms was waived. Nor would a detailed statement be needed, or

be of any aid to the Commissioner, where the "facts relied upon in support of the claim" were fully disclosed in the evidence submitted. The burden of proving the averments of his claim rests on the claimant, and he has to present under oath the evidence to support them. He may do this by oral testimony, or by affidavits or depositions, or by documentary evidence, or by any combination of these. In this evidence will be found the particular and primary facts to established the alleged error and illegality in the assessment and collection of the tax. In any event how can a claim, worded in general terms, but in the language of the statute, be held a nullity where no objection to its statement of the grounds for relief is made and it is fully considered by the Commissioner and rejected, not because of any defect in form or statement, but because in his opinion the tax claimed was not erroneously or illegally assessed or collected?

In practice, so far as within the experience of counsel for the petitioner, the filing of claims in general terms with supporting affidavits stating in detail the facts relied on has been favored by the Commissioner. The claim is submitted on a printed form furnished by the Commissioner, a *fac simile* of which appears as Exhibit C to the petition in the instant case (R. 6-7). In this form space of about eight lines is provided for the statement of the reasons why the claimant believes his claim

should be granted. This indicates that the Commissioner intends that the reasons shall be stated briefly and concisely and hence broadly and in general terms.

It will be noted that in the claim here involved (R. 6-7), there is attached and adopted a letter from the Commissioner to the petitioner advising him "that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence." This letter clearly indicates that the statement of the petitioner's contentions in his claim was considered as something entirely separate and distinct from his supporting evidence, but that such contentions were to be passed upon in the light of the supporting evidence.

Attention is also called to the fact that the refund a claimant may be allowed is not limited to the amount stated in his claim, although he is expected there to state the amount which he claims to be refundable. In the detailed statement of facts called for by the Commissioner's printed form, Exhibit C above, at line six the claimant names and asks for a certain number of dollars as the "Amount to be refunded (or such greater amount as is legally refundable)." In this the Commissioner recognizes the fact that if the claimant's proof in support of his claim shows an amount actually refund-

able to him greater than that stated in the claim, he is to receive such greater amount.

Therefore, to say that a claim for refund, in which the amount claimed is stated generally as a certain sum or such larger amount as the claimant may be legally entitled to, and in which the grounds for the claim, stated in the language of the statute, are that the tax was erroneously and illegally assessed and collected, is insufficient and legally a nullity, is to read into the statute a provision which Congress did not see fit to put there, and to put a narrow and strict interpretation upon its provisions, notwithstanding it is a remedial statute and as such is to be liberally construed.

This assignment of error will not be further discussed. If it is well taken, and if a claim for refund of tax stating in general terms the grounds upon which the refund is claimed is legally sufficient under the statute as a claim, then the decision and judgment of the Circuit Court of Appeals must be reversed, and the judgment of the District Court be reviewed upon its merits. But if this Court should be of the opinion that this assignment of error is not well taken, then other assignments must be considered.

SECOND ASSIGNMENT OF ERROR

This assignment presents the question of whether or not a claimant can bring a suit for the recovery of income taxes and assert and rely in his petition upon grounds for recovery not stated in his claim for refund previously filed with the Commissioner. The Circuit Court of Appeals held that in such a suit the plaintiff is limited in the grounds upon which he may recover in the suit to precisely and only the grounds which have been particularly stated in his claim for refund filed with the Commissioner. No authority is cited by the Court to support this holding, and we know of no authority which does support it.

The holding is in fact a limitation and restriction on the general jurisdiction of the District Court over the subject matter of the cause of action. Under the Constitution, Article 3, Section 2, the judicial power of the United States extends among other cases to such as arise under the Constitution, laws and treaties of the United States. It is vested, Article 3, Section 1, in one Supreme Court and in such inferior courts as the Congress may ordain and establish.

Section 24 of the Judicial Code defines the general jurisdiction of the district courts. Its provisions pertinent here are as follows:

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States. * * *"

* * * * * * * * *

"Fifth. Of all cases arising under any law providing for internal revenue * * *."

If a District Court of the United States has any appellate jurisdiction whatever, it is not of cases such as the present one, which clearly comes within its original jurisdiction as defined in the foregoing provisions of the Judicial Code. If the holding of the Circuit Court of Appeals is correct, then the jurisdiction of the District Court in a case such as the present one is of an appellate nature rather than original, for it is limited to the review or retrial of the case upon the pleadings and issues as framed and made up in the office of the Commissioner of Internal Revenue upon the plaintiff's claim for refund, and the Commissioner's rejection thereof, if it has been rejected. It is true that the trial in District Court would be *de novo,* but it would be merely a retrial of the issues, and only the same issues, presented to the Commissioner on the claim for refund. The jurisdiction of the District Court would be like that which a State Dis-

trict Court in Oklahoma has over appeals from a justice of the peace, under which the case is retried on appeal upon the pleadings filed in the justice of the peace court.

The holding of the Circuit Court of Appeals is really that the filing of a claim for refund with the Commissioner is the commencement of an action to recover the tax, and that the claim itself constitutes the claimant's pleading or statement of his cause of action, and that he is thereafter forever bound by the theory and grounds for relief which he asserts in his claim and may not ever thereafter change such theory and grounds or take a new position or assert any new grounds for recovery when he files suit in the District Court. And by the same reasoning, if the claimant is to be bound by the allegations of his claim for refund when he brings suit in court, then the defendant should likewise be bound by the reasons assigned by the Commissioner for rejecting the claim, and the jurisdiction and power of the District Court would be limited to a mere retrial of the issues as framed before the Commissioner upon the claim and the rejection thereof. Surely there is nothing in the statute which would support this position, and it is not indicated in any court decision prior to the one in the instant case. The correctness of such an interpretation of the statute is negatived by the fact that the Commissioner is not required to assign any reason for rejecting a claim, and is

not required to act on it within any fixed time or at all. He might hold it indefinitely. But after six months from the filing of the claim the claimant may bring suit as though it had been rejected. This is what the petitioner did in the instant case. But if the claim is the basis of the action at law to recover the tax, and if the statement of the plaintiff's cause of action upon suit in court for recovery is limited to the grounds stated in his claim for refund and none other, then it would seem that the Commissioner should be required to pass on the claim and state his grounds for rejecting it before suit could be brought, so that the issues for the action in court might be fully made up on both sides through the averments of the claim, as stating the plaintiff's cause of action, and through the reasons for the rejection of the claim by the Commissioner, as stating the defense. This apparently the statute does not require, nor contemplate, nor authorize, and, therefore, the position of the Circuit Court of Appeals appears unsound.

Indeed, the holding of that court, if followed to its logical conclusion, would lead further and would preclude the taxpayer from producing any evidence in support of his action in the District Court in addition to or other than that which he had previously presented to the Commissioner. Because if the Commissioner must have before him all the averments of fact in support of the claim

in order for him to pass upon the merits of it intelligently and correctly, he should also have before him all the evidence which the taxpayer has to support the claim. Otherwise the taxpayer might withhold evidence from the Commissioner, or might discover new evidence after the Commissioner had rejected his claim, which, if it had been presented to the Commissioner, might have required or caused the allowance of the claim and have rendered the suit unnecessary. If this rule obtained, then beyond question any suit brought in the District Court for the recovery of taxes after the rejection of a claim by the Commissioner would be nothing more nor less than an appeal from the Commissioner to that court, and the power and jurisdiction of the court would be limited merely to the review of the correctness of the Commissioner's decision upon the cause of action stated in the claim and the evidence presented by both sides in respect thereto.

The reason assigned by the Circuit Court of Appeals for its holding is that the Commissioner should have before him all the grounds and facts upon which the taxpayer relied for the recovery of the tax, so that he might allow the claim, if it deserved allowance, and thus "spare the parties and the courts the burden of litigation in respect thereto." This reasoning is sound enough as far as it goes, but it does not fit the facts of the supposed situa-

tion. The object of a claim for refund is to recover money which the claimant wants and believes he is entitled to. An action at law is for the same purpose. Obviously no considerable number of citizens would purposely present their claims for refund in such form as to conceal from the Commissioner the real grounds on which they hoped to get the money, or would intentionally withhold from him any evidence which would tend to establish their right to the money, so that he might reject their claims and thus give them a chance to go into court to recover the same thing they would have obtained if the claims had been allowed. Not many people, if they could obtain the desired money through a claim for refund, would prefer to have such claim rejected in order that they might have an opportunity to bring a suit in court, with its incident expense of costs, attorney's fees and time, to get the same money. Such a course would be contrary to all known rules of human conduct. If in the court action any new theory is developed, or any new facts alleged or new evidence produced, it may be safely assumed that these things were overlooked or were not available when the claim was presented to the Commissioner.

The answer to the position taken by the Circuit Court of Appeals on this point is well stated in the decision of Judge Thomas in *Union & New Haven Trust*

Co. v. *Eaton,* which is quoted at length hereinabove at page 2 and need not be repeated here. We ask that the language of that decision be read in connection with this assignment of error.

The United States Board of Tax Appeals was created for the purpose of determining, in a judicial or quasi-judicial proceeding, questions of disputed liability for tax in advance of the assessment of the tax by the Commissioner and the payment of the same by the taxpayer. Section 900, Revenue Act of 1924. By special statutory provision, as well as by the name given the tribunal itself, its function and jurisdiction is to receive and hear an appeal by a taxpayer from the determination by the Commissioner of a deficiency in his tax. Section 274 (a) (b), Revenue Act of 1924. Yet the Board of Tax Appeals has held that its jurisdiction is not limited to a mere review of the rulings made by the Commissioner upon appeal to it, but that it will try the question of the taxpayer's liability *de novo.* In *Appeal of Gutterman Strauss Co.,* 1 B. T. A. 243, it was contended by the Commissioner that the claim advanced by the taxpayer in his appeal to the Board had not been made in proceedings before the Commissioner, and therefore, could not be raised before nor considered by the Board. In passing upon this point the Board said (pp. 244-245):

"But admitting that this claim was not made be-

fore the Commissioner, the Board is clearly of the opinion that it has jurisdiction to determine the point in issue. The Commissioner has found a deficiency in tax for the year 1919. It is the duty of this Board to determine whether the amount found as a deficiency is the correct amount of the deficiency, if any.

"Section 900 of the Revenue Act of 1924, in providing for the creation of this Board, defining its jurisdiction, and outlining methods of procedure to be followed in the determination of appeals coming before it, makes it clear that it is an independent agency in the executive branch of the Government and entirely disconnected in every respect from any other administrative agency or department. It functions under the law as a tribunal before which facts must be proved. It not only finds the facts, but its findings of fact are of record and are *prima facie* evidence in tax proceedings in all courts. The only limitation upon the procedure of the Board is that notice and an opportunity to be heard shall be given to litigants appearing before it. The Commissioner is an ordinary litigant before the board. A case is heard before the Board as a *de novo* proceeding. This is evidenced by the above and further by the Board's power to conduct hearings in accordance with such rules of procedure as it may prescribe and by the fact that there has been given to it powers requisite to a complete examination of all witnesses and documents necessary in the disposition of any case brought before it.

* * * * * * * * *

"This Board was not created for the purpose of *reviewing rulings made by the Commissioner,* but was created for the purpose of *determining the correctness of deficiencies in tax* found by the Commissioner. If the deficiency in tax found by him is greater than the true deficiency, the Board has au-

> thority to decrease it; if it is less than the true deficiency, the Board has authority to increase it (*Appeal of the Hotel DeFrance Co.*, 1 B. T. A. 28). If a taxpayer can prove to this Board that he is entitled to a deduction from gross income, the deduction will be allowed even though it has never been claimed by the taxpayer at any hearing had before the Commissioner; otherwise it would be impossible for this Board to determine the correct amount of the deficiency."

In the instant case the decision of the Circuit Court of Appeals operates to limit the original jurisdiction of the District Court, and makes it in effect a court of appeal or review from the decisions of the Commissioner upon claims for refund, and denies to it that complete original jurisdiction of the subject matter of the cause of action which the Board of Tax Appeals asserts and exercises in the case of an appeal to it from the determination by the Commissioner of a deficiency in the tax of a taxpayer.

Nor can the plaintiff, in an action at law to recover income tax, be denied the right to assert in court a ground for relief not inconsistent with, but merely not brought forward in, his claim for refund on the ground of an estoppel. It is not claimed in this case that the petitioner has taken in the suit a position inconsistent with or conflicting with that taken before the Commissioner. It is claimed merely that he brings forward a new ground for relief, based either upon facts not pre-

viously asserted or upon a conclusion of law not previously involved, in his claim for refund. It would seem that this is hardly a situation where the doctrine of estoppel applies. It is a well settled principle of law that one who relies on estoppel must plead it. In the instant case no estoppel of the petitioner to bring forward in his suit the question of the legal effect of the dividends of cash and real estate from the surplus of the Osage Mercantile Company on March 1, 1913, was pleaded by the respondent. His answer to the petition is a general denial (R. 6).

It may be noted that while the Internal Revenue Department insists that a taxpayer cannot recover in suit a refund of tax on any ground not presented to the Commissioner, yet its attitude is entirely different in respect of the taxpayer's liability. In Treasury Decision 3251, promulgated under date of November 25, 1921, it is said:

> "To Collectors of Internal Revenue and Others Concerned: The validity of an assessment depends upon the law and actual facts existing. Therefore, an assessment made upon an erroneous theory or by mistake may not be remitted or abated because so made if, at the time its validity is passed upon, the Commissioner is in possession of evidence which shows an equivalent amount of tax is properly due in connection with the income, transaction or matter upon which the assessment is predicated."

Thus the Commissioner reserves the right at all times to enforce an assessment of tax, even though made

upon an erroneous theory or a mistake of fact, if it appears that upon some other theory or the discovery of facts not previously known, the taxpayer would owe an equivalent amount of tax. This is precisely the thing that the Circuit Court of Appeals said the taxpayer cannot do when he brings suit in the District Court to recover taxes which he claims were erroneously and illegally assessed and collected. Under that court's holding, even though it be plainly manifest that the tax in controversy was erroneous and illegally assessed and collected, yet if in his claim for refund the taxpayer based liis right upon an erroneous theory, or made a mistake in his facts, he could not recover in the suit.

In the case of *United States* v. *Haar et al.,* 19 F (2d) 399, 404, decided in the District Court for the Southern District of Georgia, the facts were that the Commissioner had made an emergency assessment of tax without the taxpayers having actually filed a return. Thereafter the taxpayers claimed and were allowed an abatement of a large part of the tax. Later the Government brought suit to enforce certain liens for the tax and the defendants raised the question that the entire tax was void because not based on any return. The Government contended that they were estopped to assert that the tax was void, because they had applied for and obtained an abatement of part of it without raising the question of

its invalidity. In passing on that contention the court said:

> "It is urged by the United States that because the defendants sought and obtained abatements from the original assessment without disclosing their contention that the assessment was void in the absence of a return they are now estopped from asserting such contention of invalidity. There is no proof or insistence that the United States has in any way foregone anything or acted to its hurt by reason of such abatements or of the omission to assert more promptly the attack upon the validity of the assessments. The essence of estoppel is action or inaction to one's detriment by reason of which the plea of estoppel is based. There is no estoppel here."

The petitioner confidently believes that this assignment of error is well taken, for that there is no authority found in the statutes for restricting a taxpayer's case upon his suit in the District Court to the precise and particular grounds for recovery of the tax stated in his claim for refund, and such position is not supported by sound reasoning, nor can it be supported on the theory of estoppel. If this assignment of error is well taken, then the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court be reviewed upon its merits. But if the court should be of the opinion that this assignment is not well taken, then the other assignments must be considered.

THIRD ASSIGNMENT OF ERROR

This assignment of error presents for review the question of the correctness of the conclusion reached by the Circuit Court of Appeals that the grounds relied on in the petition in the suit in District Court are entirely different from those contained in the claim for refund.

With the utmost deference and respect for the views of the Circuit Court of Appeals, this conclusion appears patently erroneous and both unwarranted and unreasonable. The claim for refund expressly adopts the appeal previously filed with the Commissioner and by reference makes the same a part of the claim. A specific statement of the grounds relied on for the refund is set out in this appeal and the same was put in evidence as a part of the Commissioner's letter rejecting the claim, petitioner's Exhibit 5 (R. 54). From this it appears that one of the grounds stated in the claim for refund and alleged as error in the assessment of the tax was that the Commissioner, in determining the petitioner's tax liability, "used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof, as a basis for determining the gain derived therefrom at liquidation" (R. 54-55). In the petition in the suit it is alleged as a ground of plaintiff's cause of action that the corporate stock in question on March 1, 1913, "was of the fair mar-

ket value of $500.00 a share on said date" (R. 3), and "that in ascertaining the gain or loss of the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913" (R. 4).

It would seem that the two statements above quoted clearly relate to the same transaction and clearly present the same question and the same grounds for relief. Both in the claim and in the petition the ground of objection to the Commissioner's action is that he did not take the true and correct March 1, 1913, market value of the corporate stock as the cost basis for determining the profit realized thereon upon liquidation of the corporation in 1920.

Another ground specified in the claim for refund as error in the assessment and collection of the tax is that the Commissioner in determining the petitioner's tax liability, "did not deduct from the capital and surplus of said company [Osage Mercantile Company] at date of liquidation, the full amount of its outstanding liability" (R. 55). In the petition in the suit it is alleged as a part of the plaintiff's cause of action, in respeect of the dis-

*These figures are in error and are corrected by a trial amendment to $203.71 (R. 45).

tribution of the corporation's assets to its stockholders at liquidation "that the net actual and fair market value of the assets so distributed was $88,408.97 on that date" (R. 3-4), and "that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took * * * $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders" (R. 4). It seems that these two statements clearly relate to the same transaction and clearly present the same ground for the relief sought. In both the question is as to the correct and true value of the assets distributed to the stockholders, of whom the petitioner was one, at liquidation of the company in 1920.

Surely the most casual comparison of the language used in the claim and in the petition shows that both relate to the same subject matter, the same transaction, and the same state of facts, and state substantially the same grounds. In both the grounds of error and illegality in the assessment and collection of the tax are clearly stated to be the undervaluation by the Commissioner of the taxpayer's corporate stock on March 1, 1913, which is taken as the cost basis of such stock for the purpose of deter-

mining the gain realized at liquidation in 1920, and the overvaluation by the Commissioner of the assets of the corporation distributed in kind to its stockholders upon liquidation in 1920. Upon this assignment of error no authorities can be presented and no extended argument is necessary. The question is purely one of fact to be determined by a comparison of the language used in the claim for refund with that used in the petition in the suit. If the court, upon examining and comparing the language of those two instruments, cannot see and cannot say that they are in harmony and present in substance the same grounds for the relief sought by the taxpayer, then argument by counsel would be of no avail to convince the court on that point.

Surely the plaintiff in a suit for the recovery of tax is not bound and compelled to use the precise and exact language in stating his cause of action that he has used in his claim for refund in stating the grounds thereof. It should be sufficient to meet the requirements of the law, even if the law should be as announced by the Circuit Court of Appeals, that the grounds alleged and the language used in the claim and in the petition should relate to the same subject-matter and the same transaction, and depend upon the same state of facts in substance. If this is true, then the petitioner confidently asserts that his petition in the suit is based upon the

same grounds set out in his claim for refund, and that the Circuit Court of Appeals is clearly in error in the statement that the petition presents entirely different grounds from those relied on in the claim. Indeed, about the only way in which the petition could have been brought in closer conformity to the claim for refund would have been to have copied the language of the latter *verbatim.*

If this court should be of the opinion that the grounds of recovery alleged in the petition are in substance the same as those alleged in the claim for refund, and that, therefore, this assignment of error is well taken, then it will not be necessary to consider the further assignments of error in respect of the decision of the Circuit Court of Appeals, but the judgment of that court should be reversed, and the judgment of the trial court should be reviewed on the merits. But if the court should hold that this assignment is not well taken, then other assignments must be considered.

FOURTH ASSIGNMENT OF ERROR

This assignment presents the question of whether or not the filing of a sufficient claim for refund as a basis for a subsequent suit is a jurisdictional question, and is not waived, even if not raised in the trial court, but may be raised for the first time in a court of review.

The petitioner contends that, in a suit against a Collector to recover income tax alleged to have been erroneously and illegally assessed and collected, the filing of a claim for refund is not essential to the general jurisdiction of the District Court over the subject matter of the action, but the failure to file such claim is a matter in bar of the plaintiff's right to maintain the suit, and is waived by the defendant if he joins issue and goes to trial and suffers a judgment to be rendered on the merits of the case without making the objection, or in some manner raising the question for the trial court's consideration, that no claim for refund was filed with the Commissioner prior to the suit.

The fact is noted that this action is one against the respondent as an individual in his capacity as collector of internal revenue, and is not one against the United States. The decision of the Circuit Court of Appeals erroneously terms it "a suit against the Government" (R. 86). That it is markedly different in character and subject to different rules and principles of law from a suit against the Government will appear below.

It may be conceded that in suits against the United States the failure of the plaintiff to file a claim for refund prior to suit is a complete bar to his right to maintain the suit, and that such bar cannot be waived by any officer of the United States. *Rock Island R. R. Co.* v.

United States, 254 U. S. 141, 41 Sup. Ct. 55. In this respect it is like the bar of the statute of limitations, which no one has authority to waive on behalf of the United States. *Finn* v. *United States,* 123 U. S. 227, 8 Sup. Ct. 82. But this is contrary to the general rule applicable to private litigants that a defendant may waive his objection to the plaintiff's right to maintain the suit, or any defense thereto or exemption therefrom allowed by law.

The instant case, being one against the collector and not against the United States, is governed by the same rules that apply in actions at law between ordinary private litigants. It is not subject to the same rules of procedure as a suit against the United States, and the defenses applicable are not the same. It is an action at law for money had and received, must be tried to a jury unless a jury is waived in writing by the parties (Section 649, Revised Statutes), and is governed by the rules of procedure prescribed by the laws of the State of Oklahoma in which the District Court in which it was brought is held (Revised Statutes, Section 914), and the judgment of the District Court is only reviewable by writ of error to the Circuit Court of Appeals. "The right to sue the collector for an unjustified collection was given by the common law." *United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U. S. 28, 35 Sup. Ct. 499.

A suit against the United States is purely statutory,

is not triable to a jury under any conditions, and when brought in a District Court, that court sits as a court of claims and the case is governed in form and procedure by the statutes applicable to suits in the Court of Claims, and, prior to the Jurisdictional Act of February 13, 1925, an appeal from the judgment of the District Court would lie direct to the Supreme Court. *J. Homer Fritch, Inc.*, v. *United States*, 248 U. S. 458, 63 L. Ed. 359, 30 Sup. Ct. 158.

An action at law against a Collector is personal to the Collector who collected the tax and will not lie against his successor in office. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 42 Sup. Ct. 1.

An action brought against a collector may, in event of his death *pendente lite*, be revived against his personal representative, for the action is in the nature of assumpsit at common law and survives on the death of the defendant. *Patton* v. *Brady*, 184 U. S. 608, 46 L. Ed. 713, 22 Sup. Ct. 493. In suit against a collector, interest has always been allowed in the event of recovery as for money had and received by him. *Erskine* v. *VanArsdale*, 15 Wall. 75, 21 L. Ed. 63; *Redfield* v. *Bartels*, 139 U. S. 694, 35 L. Ed. 310, 11 Sup. Ct. 683. But before the enactment of the Revenue Act of 1921, which expressly authorized interest on internal revenue taxes refunded (Section 1324, Revenue Act of 1921), no interest was recoverable

in suits brought on claims against the United States in the event of recovery of a judgment (Section 177, Judicial Code). Prior to the amendment of Section 3226, Revised Statutes, by Section 1014 of the Revenue Act of 1924, by inserting a provision therein that suits to recover internal revenue taxes could be maintained regardless of whether or not the tax was paid under protest, it was the rule, established by a long line of decisions, that no suit could be maintained against a collector for the recovery of a tax unless such tax had been paid under protest and duress. See *Fox* v. *Edwards* (C. C. A.), 287 Fed. 669, for a full discussion of the subject and collection of authorities. But after the enactment of Section 252 of the Revenue Act of 1918, a suit could be maintained against the United States for the recovery of an internal revenue tax, although the same had not been paid under protest and duress, but voluntarily. *United States* v. *Hvoslef,* 237 U. S. 1, 59 L. Ed. 813, 35 Sup. Ct. 459; *Rand* v. *United States,* 249 U. S. 503, 508, 63 L. Ed. 731, 39 Sup. Ct. 359; *Coffey* v. *Exchange Bank* (C. C. A.), 296 Fed. 807.

The fact of the marked distinction between a suit against a collector and one against the United States for the recovery of an internal revenue tax, and of the complete independence of such suits of each other, is emphasized by the following language of Mr. Justice Holmes,

speaking for the Court, in *Sage* v. *United States,* 250 U. S. 33, 37, 63 L. Ed. 828, 39 Sup. Ct. 415:

> "But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388, 46 L. Ed. 954, 963, 22 Sup. Ct. 650. At the time the judgment is entered the United States is a stranger."

The respondent in the instant case, being a natural person and privileged to assert or waive any of his defenses or exemptions, could waive, for example, the defense of the statute of limitations. The general rule, always applicable in the case of private litigants, is that limitation does not operate by its own force as a bar, but is a defense which the party who relies thereon must plead if he wishes the benefit of its provisions. *Finn* v. *United States,* 123 U. S. 227, 8 Sup. Ct. 82; *Sanger* v. *Nightingale,* 122 U. S. 176, 7 Sup. Ct. 1109. In the latter case it was held that a Georgia statute which provided that after the period of limitation, "both the right and right of action to enforce it shall be forever barred" was not a peremptory discharge of the debt, but was a mere

statute of limitations, which, to be available, must be pleaded.

Again Section 51 of the Judicial Code provides that:

> "* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is clear that this statute does not define or fix the jurisdiction of a District Court over the subject matter of an action, and that a suit may be brought in a district other than that of which the defendant is an inhabitant, and if the defendant appears and defends without objection, his right to object is thereby waived, and the District Court has full and complete jurisdiction to render judgment on the merits of the cause. As stated in *Lee* v *Chespeake & O. Ry. Co.*, 260 U. S. 653, 655, 67 L. Ed. 443, 43 Sup. Ct. 230:

> "This provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

See, also, *General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 272, 67 L. Ed. 244, 43 Sup. Ct. 106; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385, 44 Sup. Ct. 391. The latter case involved a similar statute prescribing the place of jurisdiction in admiralty cases.

It will be noted that Section 3226, Rev. Stat., as amended by Section 1014 of the Revenue Act of 1924, which provides that no suit or proceeding shall be maintained for the recovery of any internal revenue tax until a claim for refund has been filed with the Commissioner, also provides that no such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of payment of the tax unless within two years after the disallowance of the claim by the Commissioner. Apparently the provision for the filing of a claim for refund prior to suit is the same sort of defense or bar to the suit as the statute of limitations. Suppose after a claim is filed with the Commissioner, but within six months and prior to his rejection thereof, a suit is brought for the tax against a collector. The collector makes no objection, either in his pleadings or in any other form upon the trial of the cause, that the action is prematurely brought and cannot be maintained because the claim for refund had not been on file with the Commissioner for six months and had not been rejected by him, but the case is tried on the merits and a final judgment rendered. In such case has not the collector waived the defense that the action is prematurely brought? Is not the jurisdiction of the dis-

trict court unimpaired to render a valid judgment in the action where such question of the premature commencement of the suit is not raised? And in that case could such question, not raised at all in the trial court, be raised for the first time in a court of review? Upon sound reasoning and by analogy from all the authorities upon similar statutes, the collector has waived his defense that the action was prematurely brought, and the trial court had complete jurisdiction to render a valid judgment, and the premature commencement of the suit could not be raised for the first time and assigned as error in a court of review.

The section of the statute above referred to is in part a statute of limitations. It provides that suit cannot be brought after five years from payment of the tax unless brought within two years from rejection of the claim for refund by the Commissioner. The filing of the claim tolls the statute. As we have seen under the authorities cited above, the collector, in a suit against him for the tax, could waive the statute of limitations, and would in fact waive it unless he pleaded it as a defense. This notwithstanding it could not be waived by the United States as defendant in a suit for the tax.

So in respect to the rule in force prior to the Revnue Act of 1924 that suit could not be maintained against a collector to recover a tax unless such tax was paid

under protest. Failure to pay under protest was a defense or a bar to the plaintiff's action, which the collector, as a private litigant, could waive, if he chose to do so. If he joined issue with the plaintiff on the question of the legality or illegality of the exaction and collection of the tax, and the case was tried out to a final judgment on that issue, without any question of failure to pay under protest being raised in the trial court or presented in the record, under the rule supported by the cases cited, such defense or bar to the plaintiff's action would be waived, and the judgment of the district court could not be said to be void for want of jurisdiction, and such question could not be raised for the first time and assigned as error in a court of review.

The petitioner contends, therefore, that the various statutes or rules of law prescribing the district in which a defendant may be sued, and for filing a claim for refund prior to suit, and denying the right to sue for a certain length of time after filing the claim, and limiting the right to sue to a certain time after payment of the tax or rejection of the claim, are all of the same nature and of the same class and are mere defenses, privileges or exemptions granted to a collector in a suit against him to recover tax, but that they were not intended to and do not in any respect affect, limit and restrict the general original jurisdiction of the District Courts as defined in

Section 24 of the Judicial Code. They relate solely to the burdens, rights and privileges of the parties, and, not going to the general jurisdiction of the court, may be waived by the party for whose benefit they were created. Of course, if these provisions do limit the general jurisdiction of the District Court, as conferred by said Section 24 of the Judicial Code, then they cannot be waived and a failure to comply with them may be raised at any time and in any court. Indeed, in such case, the judgment of the District Court would be void for want of jurisdiction and subject to collateral attack in any other suit, or to be vacated upon motion at any time by the court in which rendered. And where the District Court did not have general jurisdiction of the subject matter of the action, it could not be conferred, or objection to the lack of it waived, by agreement or consent of the parties. But if the provisions of the statutes in respect to claims for refund and limitation of time to sue do not go to the general jurisdiction of the District Court, and so constitute an amendment or *pro tanto* repeal of Section 24 of the Judicial Code, then they may be considered as waived by a collector as defendant where he does not claim the benefit of them in the trial court. And if he there claimed the benefit of them and his claim was overruled by the court, a judgment against him might be erroneous, but would not be void for want of juris-

diction, and the error of it could be reviewed only in a direct proceeding for review on writ of error. But unless the question was raised and preserved in the record in the trial court, it could not be raised for the first time and assigned as error in the court of review.

In respect of the instant case, however, it must be borne in mind at all times that the petitioner did in fact file a claim for refund on the form prescribed for that purpose by the Secretary of the Treasury, and that such claim was not in general terms, but stated specific reasons for the refund, and was filed in apt time and was held by the Commissioner almost a year without action before suit was commenced, and was rejected after suit had been commenced,, and that all of these facts were pleaded and proven in the case. The objection, raised for the first time in the Circuit Court of Appeals, and now being considered, is that the claim for refund was not legally sufficient to support the petitioner's subsequent suit, and for the purpose of the suit was the same as no claim at all, for that it stated different reasons for claiming a refund of the tax from those which the petition in the suit stated for the recovery of it. But this objection was not made, nor was any objection made, in the trial court to the sufficiency in form, correctness and substance of the claim for refund as a basis for the petitioner's suit and no such question

was presented to, considered or passed upon by the trial court, but the objection was raised for the first time in the Circuit Court of Appeals.

In the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891, the Circuit Court of Appeals for the Fifth Circuit passed on this precise question. There the record did not show that any claim for refund at all had been filed prior to suit, but objection on that ground had not been made in the trial court and was raised for the first time in the Circuit Court of Appeals. The suit was against a collector for the recovery of tax, and not against the United States. In passing on the question, the court said:

> "No such question was raised in the District Court, nor by the assignments of error. Had it been, it might have been met by further allegation and proof, if such were necessary. We do not think it can be raised here for the first time. (*Retzer* v. *Wood, Collector,* 109 U. S. 185, 3 Sup. Ct. 164, 27 L. Ed. 900; *Green County* v. *Thomas' Executor,* 211 U. S. 598, 602, 29 Sup. Ct. 168, 53 L. Ed. 343)."

In that case the judgment for the tax went against the collector in the trial court, and he took the case on writ of error to the Circuit Court of Appeals for review. The instant case presents the anomalous situation of a judgment in the trial court in favor of the defendant on the merits of the plaintiff's allegations that the tax was erroneously and illegally assessed and collected, and of

the plaintiff taking the case on writ of error to the Circuit Court of Appeals for review, and of the defendant, without any cross-proceeding for review, or any assignments of error in the Circuit Court of Appeals, there for the first time raising the question that, because the plaintiff's claim for refund was fatally insufficient and defective, it amounted to no claim at all, and therefore, he had no right to maintain the suit and the trial court had no jurisdiction to render a judgment on the merits of the case, and contending that for that reason the Circuit Court of Appeals ought to affirm the judgment against the plaintiff upon the merits of his cause of action.

The rule that questions cannot be raised in an appellate court for the first time when they were not raised, presented or passed upon in the lower court, is so well established, so universal and well understood, that it is unnecessary to present any extended authority upon it. In the case of *Morrill* v. *Jones,* 106 U. S. 466, 1. S. Ct. 423, 425, 27 L. Ed. 267, the court said:

> "It has been argued here that, as it appears from the testimony which has been incorporated into the bill of exceptions that the importation in this case was from Prince Edward's Island, it was not from 'beyond the seas.' And therefore, that the judgment below was right. It is a sufficient answer to this objection that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on

> the trial and incorporated in some form into the record, 'an authenticated transcript' of which is returned with our writ of error."

The case of *Meyer* v. *W. R. Grace & Co.*, 290 Fed. 785, 786, decided by the United States Circuit Court of Appeals, 7th Circuit, is also in point here. In that case the court said:

> "Throughout the trial the court asserted and acted on the assertion that defendant's affidavit of a meritorious defense had the effect, under the Illinois practice, of admitting the whole of the plaintiff's case as pleaded in the verified declaration, except the one issue respecting the quality of the goods; and defendants never suggested any intention of amending their affidavit of defense in any respect except a suggestion that they desired to introduce evidence to show that plaintiff had elected a different remedy. Whether the trial court was right or wrong with respect to the Illinois practice and the federal conformity statute (Comp. St., Sec. 1537), the defendants in this court cannot raise an issue which they agreed in the trial court did not exist."

And in the recent case of *Edward Hines Yellow Pine, Trustees*, v. *Martin et al.*, 268 U. S. 458, 465, 69 L. Ed. 1050, this court said:

> "This court is a court of review, and it will not consider questions not raised or disclosed by the record brought to it for review, and which were not considered by the courts below."

Numerous cases are cited in support of the foregoing text. A fuller citation of authoritiy on this point is unnecessary.

The petitioner concludes, therefore, in respect of this assignment of error that the rule is that, in an action against a collector for the recovery of an internal revenue tax, the filing of a claim for refund with the Commissioner prior to suit is not necessary to the jurisdiction of the District Court over the action. Failure to file such claim is a defense or bar to the plaintiff's suit which the defendant may waive, if he chooses. This conclusion is based on the authorities cited above. From this it follows that where no claim is filed, if no objection on that ground is made, and no question in respect thereto is raised, in the trial court, or disclosed in the record, it cannot be raised for the first time in a court of review.

But the petitioner contends further that, as respects the instant case, even if the filing of a claim prior to suit was necessary to the jurisdiction of the District Court over the action, still the record shows that such claim was filed, and was filed in apt time, and upon the form prescribed by the Treasury Department, and was not a mere general claim, but stated the specific grounds upon which refund of the tax was sought, and that the objection raised is merely that there was not sufficient conformity in the grounds alleged for recovery in the petition in suit to the grounds alleged for refund in the claim, and that the record shows that no question of the insufficient conformity, or the non-conformity, of the allegations of the

petition to the allegations of the claim was raised in the trial court or considered or decided by that court, but such question and objection were made and raised for the first time in the Circuit Court of Appeals, and were there raised and urged as a ground or reason why the judgment of the District Court in favor of the respondent upon the issues of the erroneous and illegal assessment and collection of the tax should be affirmed, and that solely upon this ground the said judgment was affirmed by the Circuit Court of Appeals. The petitioner contends that this question, not having been raised in the trial court in any way, shape, manner or form, and not being jurisdictional, was waived by the respondent and could not rightfully be raised in and considered by the Circuit Court of Appeals when the case was there for review.

If this assignment of error is well taken, then the remaining assignment of error in respect of the judgment of the Circuit Court of Appeals need not be considered, but its judgment should be reversed, and the judgment of the trial court be reviewed on the assignments of error in respect thereto.

FIFTH ASSIGNMENT OF ERROR

This assignment of error presents the question of the correctness of the judgment of the Circuit Court of

Appeals affirming the judgment of the District Court, even if it be conceded that the holding of the Circuit Court of Appeals on the law is correct.

It appears from the opinion of the Circuit Court of Appeals that the judgment of the District Court is affirmed for the reason that the claim for refund filed by the petitioner prior to suit is, as considered and held by that court, so different from the cause of action stated in his petition that it is the same as no claim at all insofar as it furnishes the basis for the petitioner's suit. Or in other words, that the allegations of the petition in suit are such a departure from the allegations of the claim for refund that, as respects the suit, it stands as though no claim for refund had been filed before it was brought, and that, therefore, it could not be maintained in the District Court. The opinion of the court does not expressly say that it holds that the District Court was without jurisdiction, but its conclusion cannot be based on any other theory or ground than want of jurisdiction in the District Court over the case. If the point stressed by the Circuit Court of Appeals did not go to the jurisdiction of the District Court, then it was waived, because not raised in the District Court, and could not be considered by the Circuit Court of Appeals upon review.

That the Circuit Court of Appeals for the Eighth Circuit is definitely committed to the holding that the

filing of a claim for refund before suit, and the statement of specific grounds as reasons for the refund, and the conformity of the grounds for recovery alleged in a suit to those stated in the claim are all necessary to the jurisdiction of the court in the suit, is clearly shown by its decision in *Redwing Malting Co.* v .*Willcuts,* 15 F. (2d) 626, in which appears the following language:

> "It does not appear from the record that any claim under Sub-section (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to beginning this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the court upon an entirely different and distinct ground from that presented to the Commissioner."

It seems clear, therefore, that the position of the Circuit Court of Appeals is that the District Court was without jurisdiction because of the inadequate claim for refund, to render a judgment upon the merits of the case. Having taken this position, the Circuit Court of Appeals proceeded to render judgment affirming the judgment of the District Court in favor of the defendant upon the merits for the reason that such court was without jurisdiction to render any judgment upon the merits. Clearly

the judgment of the Circuit Court of Appeals is wrong, even when based upon its own holdings and conclusions of fact and law. If its reasoning and conclusion upon the law and facts of the case as stated in its opinion are correct, then its judgment should have been that the judgment of the District Court be reversed for want of jurisdiction and the cause remanded with directions to dismiss the plaintiff's case. It is a contradiction in terms to say that the judgment of a court rendered without jurisdiction should be affirmed on the ground of such lack of jurisdiction.

On this point the petitioner cites again the cases, already cited above herein, of *Webster* v. *Fall,* 266 U. S. 507, 69 L. Ed. 411; *Gnerich* v. *Rutter,* 265 U. S. 388, 68 L. Ed. 1068, 44 Sup. Ct. 532; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28-34, 41 L. Ed. 621, 623, 17 Sup. Ct. 225.

If none of the four preceding assignments of error in respect of the judgment of the Circuit Court of Appeals are held to be well taken, but this one is well taken, then the judgment of this court should be that the judgment of the Circuit Court of Appeals be reversed, and also that the judgment of the District Court be reversed with directions to dismiss the case for want of jurisdiction.

THE JUDGMENT OF THE TRIAL COURT

If this court should sustain any one or all of the first, second, third or fourth assignments of error in respect of the judgment of the Circuit Court of Appeals, then it will become necessary to review the judgment of the trial court on the merits. Therefore, the petitioner will here consider his specifications of error in respect of the judgment of that court. These have already been grouped under four heads as set forth above. They will be taken up in order.

FIRST SPECIFICATION OF ERROR

This presents the question of the correctness of the action of the trial court in deducting the amount of cash dividends paid and real estate distributed between March 1, 1913, and May 14, 1913, out of surplus of the Osage Mercantile Company on hand at March 1, 1913, from the agreed value of the assets of said corporation on March 1, 1913, and taking the remainder of the value of said assets as cost for determining the gain realized by the petitioner on his stock at liquidation of the corporation in 1920. If the distribution of real estate above mentioned was a dividend, and if the distribution thereof and the cash dividend paid out of surplus earned prior to March 1, 1913, were current, as distinguished from liquidating, dividends, then the judgment of the District Court is erroneous under the law.

There is no controversy over the facts in this case. The evidence of the petitioner was not disputed on any point of fact. The only conflict is one of opinion, or of the conclusions of fact to be drawn from the primary facts. The plaintiff in error and R. W. Tucker and Hutchins, who were stockholders in the Osage Mercantile Company at the time the Mercantile Real Estate Company was organized and the real estate transferred to it, considered the disposition of the real estate as a dividend to the stockholders of the old company. The transaction was shown on the books as a sale of the real estate, but the price at which it was sold was a little less than three-eighths of its book value and still less than that of its actual value. The transaction, therefore, plainly was not a sale in the ordinary course of business in which the seller would demand and the buyer would expect to pay the fair market value of the property. The named consideration was only nominal, and the actual consideration was the benefit to the stockholders of the old corporation which they received by virtue of their stock in the new one. The motive and the result of the transfer was to place the title to the real estate in the new corporation instead of the old, without changing the proportionate interest of the stockholders therein, but separating the real estate from the other surplus of the old and giving each stockholder his

interest therein in severalty in the form of his stock certificate in the new corporation. This was done through the form of a sale, but with no actual consideration passing from the purchaser or received by the seller, because no money actually changed hands, but the whole transaction was consummated by means of checks, each of which was offset by a corresponding credit to the drawer. The stockholders in the new corporation paid for the stock with their checks, which in turn were paid over to the old corporation, which in turn issued dividend checks for the same amounts to the same stockholders who had given their checks to the new corporation. This completed the circle and made the whole transaction purely one on paper. The stockholders in the two corporations said in their testimony that they considered the matter as a dividend of the real estate in the form of stock in the new corporation.

The witness Dye testified that the transaction was handled on the books of the corporation as a sale, but that it was obviously not a *bona fide* sale, and that, in his opinion it was a gift, but not a dividend.

The court in its findings sets forth the facts of the transaction without stating whether the disposition of the real estate in the manner shown was or was not a dividend.

TRANSFER OF REAL ESTATE WAS A DIVIDEND

The petitioner's first contention is that the real estate transferred from the Osage Mercantile Company to the Mercantile Real Estate Company of the agreed net value of $40,150.00 was a dividend to its stockholders. It is conceded that it lacks the essential elements of a sale. If it was transferred as a gift, or partly so, then to the extent it was a gift, it was one from the old corporation to its stockholders, for it went to the new corporation in which all of the stock was held by the stockholders of the old in the same proportions as they held in the old. Such a gift would be plainly and purely for their benefit. A gift distributed by a corporation out of accumulated profits to or for the benefit of its stockholders severally, solely because of the fact that they are its stockholders, and apportioned among them according to their stockholdings, and the distributive share of each separated and placed upder his individual control, is nothing more nor less than a dividend.

In 14 C. J. 798, the following definition of a dividend is given:

> "The term 'dividend' as applied to corporate stock may be defined as that portion of the profits and surplus funds of a corporation which has been actually set apart, by a valid act of the corporation, for distribution among the stockholders according to their respective interest, in such a sense as to be-

come segregated from the property of the corporation, and to become the property of the stockholders distributively."

Among the numerous judicial definitions of a dividend set out in a note to the foregoing text are the following:

"Corporate funds derived from the business and earnings of the corporation, appropriated by the corporate act to the use of and to be divided among stockholders." *Hyatt* v. *Allen,* 56 N. W. 553, 556, 15 A. M. R. 449.

"That portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." *Mobile, etc., R. Co.* v. *Tennessee,* 153 U. S. 486, 496, 14 S. Ct. 968, 38 L. ed. 793.

"Such profits, or such portion of the profits, as the directors, by proper resolution, have ordered distribution among the stockholders." *Knight* v. *Alamo Mfg. Co.,* 190 Mich. 223, 226, 157 N. W. 24.

"That portion of the profits which is set apart, and divided by the directors or managers of the corporation among the stockholders." *Parks* v. *Automatic Bank Punch Co.,* 14 Daly 424, 426, 14 N. Y. St. 710.

"That portion of its profits, which the directors separate from the general stock, and apply to the benefit of the stockholders." *State* v. *Farmers' Bank,* 11 Oh. 94, 95.

"All distributions to corporators, of the profits of the corporation, whether such distributions were large or small; or whether made at long or short intervals; and without any regard to the manner or

place of their declaration or mode of payment." *Clarkson* v. *Clarkson,* 18 Barb. (N. Y.) 646, 657.

"A fund set apart by a corporation, out of its profits, to be apportioned among the shareholders." *Lancaster Trust Co.* v. *Mason,* 151 N. C. 264, 269, 65 S. E. 1015.

'Earnings of the company to be divided among its shareholders in proportion to their respective holdings." *Com.* v. *Western Land, etc. Co.,* 156 Pa. 455, 472, 26 A. 1034.

Clearly, under the foregoing definitions, the real estate transaction under consideration was a dividend from the Osage Mercantile Company to its stockholders. Especially is this true in view of the often announced rule that in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder, the courts will regard matters of substance and disregard forms. *Lynch* v. *Turrish,* 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087; *Southern Pac. Co.* v. *Lowe,* 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142; *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133; *Eisner* v. *Macomber,* 252 U. S. 189, 40 Sup .Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *United States* v. *Phellis,* 257 U. S. 156, 42 Sup Ct. 63, 66 L. Ed. 180.

The petitioner is not contending that the real estate transaction was a sale, although it was so set up on the books of the corporation. The Commissioner of Internal Revenue did not contend that it was a sale. Ob-

viously, if it was a sale, the old corporation received and had the purchase price in lieu of the real estate. This sum without dispute was distributed to its stockholders in a formal dividend paid by check. The transaction thus construed would mean that the corporation had converted part of its earned surplus at March 1, 1913. into cash and then distributed the cash in a dividend in May, 1913. So that if the transaction should be considered as a sale, the same result is reached, for instead of the real estate itself being distributed as a dividend to the stockholders, the proceeds derived from the sale of it are so distributed.

DISTINCTION BETWEEN CURRENT AND AND LIQUIDATING DIVIDENDS

If it be established that the disposition made of the real estate constituted a dividend, the question next to be determined is whether it was a current or a liquidating dividend. The plaintiff in error contends that it was a current dividend. The Commissioner treated it as a liquidating dividend. If a liquidating dividend, then it was a partial realization of the March 1, 1913, value of the stock, the remainder of which was realized on the final liquidation of the corporation in 1920, the two combined constituting the full amount realized thereon.

For the purpose of determining loss or gain on the

sale or disposition of property acquired prior to March 1, 1913, its fair market price or value on that date is taken as costs. Section 202 (a) of the Revenue Act of 1918, in force at the liquidation of the old corporation in 1920, is as follows:

> "That for the purpose of ascertaining the gain derived or loss sustained from the sale or disposition of property, real, personal or mixed, the basis shall be (1) in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date, and (2) in the case of property acquired on or after that date, the cost thereof."

Therefore, the fair market value of the stock of the petitioner on March 1, 1913, it its cost for the purpose of ascertaining the gain derived upon his final disposition of it.

The distinction between current and liquidating dividends is clearly set forth in Article 1548 of Regulations 45, promulgated by the Commissioner of Internal Revenue under the Revenue Act of 1918. This is as follows:

> "Art. 1548. *Distribution in liquidation.* So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value

> as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.''

It follows, therefore, that if the cash and real estate distributed in 1913 out of earnings and surplus of the corporation on hand at March 1, 1913, was a current dividend, the amount received by the petitioner was income to him in that year and taxable as such. It also follows that if it was taxable income in 1913, it could not also be taxed as income in 1920. If it was a liquidating dividend, it was a partial realization of the cost or March 1, 1913, value of his stock and was not income and not taxable, but could properly be combined with the final realization thereof on liquidation of the corporation in 1920 to constitute the full amount realized on the complete disposal of his stock, and the excess of these combined realizations over its March 1, 1913, value would be gain to him in 1920, and would con-

stitute taxable income in that year. This, as the plaintiff in error understands it, is the position of the Commissioner of Internal Revenue.

STOCK IN NEW CORPORATION WAS DIVIDEND FROM OLD

In support of his contention that the stock in the Mercantile Real Estate Company was a dividend, the petitioner cites the following authorities: *U. S.* v. *Phellis,* 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180; *Rockefeller* v. *U. S.,* 257 U. S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186; *Marr* v. *U. S.,* 268 U. S. 536, 45 Sup Ct. 575.

In *United States* v. *Phellis,* the facts were that Phellis held stock in the E. I. duPont de Nemours Power Co., and that a new corporation by the name of the E. I. duPont de Nemours & Co. was organized and took over the assets and business of the old company. The old company had an excess of assets over liabilities showing a large surplus of accumulated profits. The new company issued stock against this accumulated surplus so that the stockholders in the old company received two shares of stock in the new for each one held in the old. The old company retained an amount of cash and received an amount of debenture stock in the new company sufficient to redeem its outstanding bonds and maintain its capital stock unimpaired, and continued as a going

concern, but did no business except to redeem its bonds, make some stock exchanges and collect and dispose of dividends. The transfer of assets, issue of stock, and consummation of the transaction was done as of October 1, 1915, and so came under the Revenue Act of 1913. The opinion of the court does not state specifically that the surplus against which the new stock was issued was accumulated prior to March 1, 1913, but the amount of such surplus, and the facts and circumstances of the situation disclosed, fairly indicate that at least the larger part of it was so accumulated. The court held that the shares of stock in the new company were a dividend to the stockholders of the old company and that the value of the new stock, which represented the distribution of surplus or accumulated profits, was income taxable to the stockholders in the year received. The organization of the new company and the transfer of assets of the old company to the new and the issue of stock in the new to the stockholders in the old is not different in any material respect from the transaction of the Osage Mercantile Company and the Mercantile Real Estate Company involved in the instant case.

In the opinion the court says:

> "Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the test laid

down in *Eisner* v. *Macomber,* 252 U. S. 189, 207, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R.1570), a gain, derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal.

* * * * * * * * * * *

"The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which is now held to represent its surplus of accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common stockholders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former corporate profits, and drawn by them severally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the proper sense.

* * * * * * * * * * *

"In thus creating the common stock of the new company and transferring it to the old company for distribution pro rata among its stockholders, the parties were acting in the exercise of their rights, for the very purpose of placing the common stockholders individually in possession of new and substantial property rights *in esse,* in realization of

their former contingent rights to participate eventually in the accumulated surplus. No question is made but that the proceedings taken were legally adequate to accomplish the purpose. The new common stock became treasury assets of the old company, and was capable of distribution as the manufacturing assets whose place it took were not. Its distribution transferred to the several stockholders new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers. According to the findings the stock thus distributed was marketable. There was neither express nor implied condition, arising out of the plan of reorganization or otherwise, to prevent any stockholder from selling it; and he could sell his entire portion or any of it without parting with his capital interest in the parent company, or affecting his proportionate relation to the interest of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.

"It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit derived from his capital interest in the old company, not in liquidation of the capital, but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for separate use. Hence it constituted individual income within the meaning of the Income Tax Law, as clearly as was the case of *Peabody* v. *Eisner*, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152."

In *Rockefeller* v. *U. S.*, decided the same day as *U. S.* v. *Phellis,* the facts were that the Prairie Oil & Gas Company prior to the year 1914 was engaged in producing, purchasing and selling crude petroleum and transporting it through its pipe lines. At the same time the Ohio Oil Company was engaged in the same kind of business. In order to avoid a probable conflict of Federal authority between the Interstate Commerce Commission and the Federal Trade Commission, indicated by certain legislation enacted and court decisions rendered in 1914, it was determined by each company upon advice of counsel that its pipe line property should be owned and operated by a separate corporation. The stockholders of the Prairie Oil & Gas Company caused a new corporation to be organized by the name of the Prairie Pipe Line Company, to which all the pipe line property of the old company was transferred in consideration of the issue and delivery of the entire capital stock of the new company pro rata to the stockholders of the old one. Similarly the stockholders of the Ohio Oil Company caused a new corporation to be formed by the name of the Illinois Pipe Line Company, to which all the pipe line property of the old company was transferred in consideration of the issue to it of the entire capital stock of the new company, which was at once distributed pro rata to the stockholders of the old one.

The only difference in the arrangements carried out by the two old corporations was that in the case of the Prairie Oil & Gas Company the stock in the new pipe line company was issued directly to its stockholders, whereas in the case of the Ohio Company the stock in the new pipe line company was issued to the old company,which immediately distributed the same to its stockholders in the form of a dividend. The new companies were each capitalized at the actual value of the pipe line property received, and in each case the transfer of its pipe line property left the capital of the old company unimpaired. The transaction occurred in 1915 and so the Revenue Act of 1913 applied. The opinion does not specifically state that the pipe line properties represented accumulated profits or surplus at March 1, 1913, but the value of these properties, $27,000,000.00 for the Prairie pipe lines and $20,000,000.00 for the Ohio pipe lines, and the fact that the transaction occurred in 1915, would fairly indicate that they did so either in whole or for the most part.

The court held that the stock in the new companies was in each case a current dividend by the old companies to their stockholders out of accumulated surplus and was taxable as income to the stockholders in the year received. In the opinion it is said:

"Under the facts as recited we deem it to be too

plain for dispute that in both cases the new pipe line company shares were in substance and effect distributed by the oil company to its stockholders; as much so in the case of the Kansas company, where the new stock went directly from the pipe line company to the stockholders of the oil company, as in the case of the Ohio company where the new stock went from the pipe line company to the oil company and by it was transferred to its stockholders. Looking to the substance of things the difference is unessential. In each case the consideration moved from the oil company in its corporate capacity; the new company's stock issued in exchange for it was distributed among the oil company's stockholders in their individual capacity, and was a substantial fruit of their ownership of stock in the oil compnay, in effect a dividend out of the accumulated surplus.

"The facts are in all essentials indistinguishable from those presented in *United States* v. *Phellis*, 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180, decided this day. In these cases, as in that, regarding the general effect of the entire transactions resulting from the combined action of the mass of stockholders, there was apparently little but a reorganization and ownership of stock in the oil company, in effect a financial readjustment of the affairs of the companies concerned, here a sub-division of companies, without immediate effect upon the personnel of the stockholders, or much difference in the aggregate corporate activities or properties. As in the Phellis case, the adoption of the new arrangement did not of itself produce any increase of wealth to the stockholders, since whatever was gained by each in the value of his new pipe line stock was at the same moment withdrawn through a corresponding diminution of the value of his oil stock. Nevertheless the new stock represented assets of the oil companies standing in the place of the pipe line properties that

before had constituted portions of their surplus assets, and it was capable of division among stockholders as the pipe line properties were not. The distribution, whatever its effect upon the aggregate interest of the mass of stockholders, constituted in the case of each individual a gain in the form of actual exchangeable assets transferred to him from the oil company for his separate use in partial realization of his former indivisible and contingent interest in the corporate surplus. It was in substance and effect, not merely in form, a dividend of profits by the corporation, and individual income to the stockholder."

There is no distinction in substance, and scarcely any in form, between the transactions involved in the foregoing case and the one involved in the instant case. If the stock in the new pipe line companies was a dividend from the old companies to their stockholders, then the stock of the plaintiff in error in the Mercantile Real Estate Company was a dividend from the Osage Mercantile Company. And since their stock was taxable income in the year received, his was too.

In *Marr* v. *U. S.* the facts were that Marr and wife prior to March 1, 1913, owned certain shares of stock in the General Motors Company of New Jersey. In 1916 they received in exchange for this stock certain shares of stock in a new corporation named the General Motors Corporation of Delaware. The new corporation issued its stock in exchange. for the stock of the old on a stipulated basis. The Treasury Department ruled that the

difference between the cost to Marr and wife of their old stock and the value of the stock in the new corporation was gain or income subject to tax. The taxpayer contended that the transaction between the two corporations was merely a reorganization of the one business and that, while he had a larger number of shares of stock in the new corporation than he held in the old, yet they represented no larger value than he had before the transaction and so he had realized no gain. The court held adversely to him and ruled that the difference between the cost of the old stock and the value of the new was taxable gain. In the opinion it is said:

> "The government insists that identity of the business enterprise is not conclusive, that gain in value resulting from profits is taxable as income, not only when it is represented by an interest in a different business enterprise or property, but also when it is represented by an essentially different interest in the same business enterprise or proprty; that, in the case at bar, the gain actually made is represented by securities with essentially different characteristics in an essentially different corporation; and that, consequently, the additional value of the new securities, although they are still held by the Marrs, is income under the rule applied in *United States* v.*Phellis*, 257 U. S. 156, 42 S. Ct. 63, 66 L. Ed. 180; *Rockefeller* v. *United States*, 257 U. S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186; and *Cullinan* v. *Walker*, 262 U. S. 134, 43 Sup. Ct. 495, 67 L. Ed. 906. In our opinion the government is right."

The rule that where stock in a new corporation is

distributed directly or indirectly to the stockholders of an old one in consideration for its assets, in whole or in part, such stock is a dividend and taxable as income to the stockholders, seems to be extended to the very limit in *Marr* v. *U. S.* The case is cited here because it appears that the contention of the government there which the court approved is an admission of the contention of the petitioner here.

The petitioner says that the foregoing authorities establish conclusively that the stock in the Mercantile Real Estate Company which he received in 1913 was a dividend on his stock in the Osage Mercantile Company. It was an asset of exchangeable and actual value from his capital interest in the old company, proceeding from it as a result of a division of former corporate profits and drawn by him separately for his individual and separate use and benefit. (*U. S.* v. *Phellis.*) It was a substantial fruit of his ownership of stock in the old company, in effect a dividend out of the accumulated surplus (*Rockefeller* v. *U. S.*).

THE 1913 DIVIDENDS WERE CURRENT DIVIDENDS

In support of his contention that the dividend received in 1913 in stock and in cash distributed out of accumulated profits or surplus at March 1, 1913, was a

current as opposed to a liquidating dividend and was taxable as income in that year, the petitioner cites the following authorities: *Lynch* v. *Turrish,* 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087; *Lynch* v. *Hornby,* 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149; *Peabody* v. *Eisner,* 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152; and also *U. S.* v. *Phellis* and *Rockefeller* v. *U. S., supra.*

In *Lynch* v. *Turrish,* the Court held that a final dividend in liquidation of a corporation in 1914 in excess of the par value of the stock could not be considered income as to such excess and taxable in that year, but was merely the realization of the fair market price of the stock created before and existing at March 1, 1913. The point that this was a liquidating dividend, not a current dividend, and so not taxable, is emphasized in the following statement in the opinion:

> "And in determining the application of the statute to Turrish we must keep in mind that on the admitted facts the distribution received by him from the Payette Company manifestly was a single and final dividend in liquidation of the entire assets and business of the company, a return to him of the value of his stock upon the surrender of his entire interest in the company, and at a price that represented its intrinsic value at and before March 1, 1913, when the act took effect."

In *Lynch* v. *Hornby,* decided the same day as *Lynch* v. *Turrish,* the Court laid down the rule that where a

corporation declared a dividend out of surplus earned prior to March 1, 1913, yet did not liquidate, but continued its corporate business after as before, such dividend was a current and not a liquidating dividend and was taxable income to the stockholder in the year received. The distinction between this case and *Lynch* v. *Turrish* is clearly set forth in the following from the opinion:

> "The case was tried in the District Court and argued in the Circuit Court of Appeals together with *Lynch, Collector,* v. *Turrish,* 236 Fed. 653, 149 C. C. A. 649, and was treated as presenting substantially the same question upon the merits. In our opinion it is distinguishable from the Turrish case, where the distribution in question was a single and final dividend received by Turrish from the Payette Company in liquidation of the entire assets and business of the company and a return to him of the value of his stock upon the surrender of his entire interest in the company, at a price that represented its intrinsic value at and before March 1, 1913, when the Income Tax took effect.
>
> "In the present case there was no winding up or liquidation of the Cloquet Lumber Company, nor any surrender of Hornby's stock. He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion might declare. *Gibbons* v. *Mahon,* 136 U. S. 549, 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. The operations of this company in the year 1914 were, according to the facts pleaded, of a nature essentially like those in which it had been engaged for more than a quar-

ter of a century. The fact that they resulted in converting into money, and thus setting free for distribution as dividends, a part of its surplus assets accumulated prior to March 1, 1913, does not render Hornby's share of those dividends any the less a part of his income within the true intent and meaning of the act.

* * * * * * * * *

"Hence we construe the provision of the act that 'the net income of a taxable person shall include gains, profits, and income derived from * * * interest, rent, dividends, * * * or gains, or profits and income derived from any source whatever' as including (for the purposes of the additional tax) all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913. In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital.

* * * * * * * * *

"Of course we are dealing here with the ordinary stockholder receiving dividends declared in the ordinary way of business. *Lynch, Collecter* v. *Turrish* and *Southern Pacific Co.* v. *Lowe, Collector,* this day decided rest upon their special facts and are plainly distinguishable."

In *Peabody* v. *Eisner,* decided the same day as

Lynch v. *Turrish* and *Lynch* v. *Hornby,* the Court followed the holding in the latter case. The facts were that Peabody received a dividend in 1914 on stock in the Union Pacific Railroad Company which he owned prior to March 1, 1913. The dividend consisted of cash and stock in the Baltimore & Ohio Railroad Company. In his tax return he omitted the portion of the dividend which he considered to be a distribution of earnings of the corporation prior to March 1, 1913. The Court says:

> "Afterwards he was subjected to an additional assessment upon a valuation of the balance of his dividend, and this, having been paid under protest, is the subject of the present suit, the theory of which is that the entire earnings, income, gains, and profits from all sources realized by the Union Pacific Railroad Company from March 1, 1913, to March 2, 1914, remaining after the payment of prior charges, did not exceed $4.12 per share of the Union Pacific common stock, and that the cash and Baltimore & Ohio stock disposed of in the extra dividend (so far as they exceeded the value of $4.12 per share of Union Pacific) did not constitute a gain, profit, or income of the Union Pacific, and therefore did not constitute a gain, profit, or income of the plaintiff arising or accruing either in or for the year 1914 or for any period subsequent to March 1, 1913, the date when the Income Tax Law took effect."

Then, after distinguishing the case at some length from *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, decided the same day, the Court held that it was ruled by *Hornby* v. *Lynch,* and that Pea-

body was taxable on all the dividend, including the part distributed from earnings prior to March 1, 1913.

In *U. S.* v. *Phellis* and *Rockefeller* v. *U. S., supra,* it is plain that the dividends there involved were paid in 1915 out of accumulated profits or surplus at March 1, 1913, in large part, if not wholly. No question of their non-taxability on this ground is raised or considered, but they were held to be taxable income to the stockholders on authority of *Peabody* v. *Eisner* and in harmony with *Hornby* v. *Lynch.*

As to the $5,796.53 of dividends distributed in cash in 1913 out of earned surplus at March 1, 1913, there is and can be no question that such sum was current income to the petitioner in 1913 and was taxable in that year. If the real estate transaction is, as he contends, a dividend of its value to the old corporation's stockholders, then such dividend is a current one taxable as income in that year. The petitioner made return of his income for taxation for the year 1913 (R. 18) and presumably included both the cash and real estate dividends in his income on such return.

Of course, if the dividends in question were current dividends constituting taxable income in 1913, then they could not be treated as a partial realization of the March 1, 1913, value of the stock and be combined with the value

realized at liquidation in 1920 into a so-called total value realized, and thereby be made to show a realization in excess of March 1, 1913, value, so that such excess might be set up as a gain subject to tax. This in effect would be to make the 1913 dividends income in 1920. The same income cannot be taxed in more than one year. And income taxable in a certain year, whether actually taxed then or not, cannot be transferred to and taxed as income in another year. In Article 22, Regulations 45, it is said:

> "Net income must be computed with respect to a fixed period. Usually that period is twelve months and is known as the taxable year."

And again in Article 23:

> "All items of gross income shall be included in gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be accounted for as of a different period. * * * A taxpayer is deemed to have received items of gross income which have been credited or set apart for him without restriction."

And again in Article 31:

> "Dividends are taxed at the rates for the year in which paid."

If the distribution in question in 1913 was taxable income in that year, then it cannot again be taxed in 1920. After income is once legally taxed, it becomes cap-

ital and is not again subject to tax. The truth of this is so obvious that no citation of authority is required. Yet the result of the Commissioner's action is to transfer taxable income in 1913 to 1920 and tax it in that year. The computation by which the Commissioner arrived at the alleged taxable gain realized by the plaintiff in error on each share of stock in the year 1920 may be set forth in the form of a table as follows:

Liquidating dividend July 20, 1920,		$319.46
March 1, 1913, Value (Cost)	$357.86	
Less cash and real estate distributed in 1913 out of March 1 value	153.15	
Cost remaining July 20. 1920		203.71
Gain taxable in 1920		$115.75

By a different arrangement of the table the same result is reached as follows:

Cash and real estate distributed in 1913 out of March 1 value	$153.15	
Plus liquidating dividend July 20, 1920	319.46	
Total realization on stock		$472.61
Less March 1, 1913, value (cost)		356.86
Gain taxable in 1920		$115.75

The total gain was arrived at by the Commissioner by multiplying $115.75, the gain per share above shown, by 150, the number of shares owned by the petitioner.

Omitting the 1913 dividends the computation would be as follows:

March 1, 1913, value per share	$356.86
Liquidating dividend July 20, 1920, per share	319.46
Net loss per share	$ 37.40

It thus appears that unless the 1913 dividends be held to be liquidating dividends, and not income and not taxable in that year, the plaintiff in error realized no gain on his stock in 1920, but instead realized substantially less than its March 1, 1913, value.

It must be borne in mind at all times that the Osage Mercantile Company had a large earned surplus on March 1, 1913, the exact amount thereof being $256.86 per share of stock; that after deducting the real estate and cash distributed out of such surplus in 1913, not only was its capital still unimpaired, but it had $103.71 per share of such surplus remaining; that it continued in business and carried on operations after the 1913 dividends the same as before down to its liquidation in 1920; that the plaintiff in error still owns the stock he received in 1913 in the Mercantile Real Estate Company, not having disposed of any of it; and that this corporation is still in existence and still owns all or substantially all of the real estate in question.

In our opinion the authorities presented above, in

the light of the uncontroverted facts, are conclusive in favor of the contention of the petitioner, and the judgment of the trial court must be reversed and the petitioner must be awarded judgment for the $6,642.13 in controversy with interest thereon at the rate of 6% per annum from October 30, 1923.

SECOND SPECIFICATION OF ERROR

This specification of error presents practically the same question as the first specification of error and depends on the determination of that one. If the real estate distributed and cash dividends paid out of surplus earned by the Osage Mercantile Company prior to March 1, 1913, were current dividends under the law and taxable as income to the stockholders in the year 1913 in which received, then their amount could not be applied in reduction of the March 1, 1913, value, or cost, of the petitioner's stock, and so to apply it and then use the reduced March 1, 1913, value of the stock as cost and deduct that value from the value of the corporation's assets at liquidation in 1920 to show a gain realized by the petitioner on his stock was erroneous and the petitioner should have recovered judgment. If he should have recovered judgment on this ground the amount thereof is not in dispute or controversy. Upon the trial it was

stipulated in the record by counsel for the respondent that if the Government's theory and method of treating the cash dividends paid and real estate distributed out of the surplus of the corporation at March 1, 1913, as liquidating dividends was not correct, then the plaintiff was entitled to judgment and that the amount of his judgment should be $6,642.13 (R. 64). Under this stipulation no computations based on March 1, 1913, value, or cost, and July 20, 1920, liquidation value, or sale price, of the petitioner's stock, as these values or figures are shown in the record, are necessary. The stipulation referred to is that if the Government is wrong and the petitioner right upon the question of the correct March 1, 1913, value of the stock to be used as cost in determining the gain in 1920, then the petitioner should have judgment for $6,642.13. But if the Government is right and the petitioner wrong on such theory and method, then the petitioner was entitled to receive only $216.26 of refund admitted by the Commissioner's letter. Hence, assuming that the petitioner's method and theory was correct, which, we believe, has been fully demonstrated under the first specification of error above, then it was error for the trial court to refuse to render judgment for the petitioner for $6,642.13, with interest at the rate of 6% per annum from October 30, 1923, and the costs of this action, and the judgment of that court should be re-

versed and the cause remanded with directions to enter such a judgment for the petitioner.

THIRD SPECIFICATION OF ERROR

The third specification of error relates to the question of the good will value of the stock at March 1, 1913. Good will, as an element of value in a commercial business, is fully recognized by business men and the courts, and also in the application of the Federal income tax laws by the Commissioner of Internal Revenue. In Article 41 of Regulations 45, promulgated by the Commissioner under the provisions of the Revenue Act of 1918, it is provided as follows:

> "Any profit or loss resulting from an investment in good will can be taken only when the business, or a part of it, to which the good will attaches is sold, in which case the profit or loss will be determined upon the basis of the cost of the assets, including good will, or their market value as of March 1, 1913, if acquired prior thereto. If nothing was paid for good will acquired after February 28, 1913, no deductible loss is possible, although, on the other hand, upon the sale of the business there may be a profit. It is immaterial that good will may never have been carried on the books as an asset, but the burden of proof is on the taxpayer to establish the cost or fair market value on March 1, 1913, of the good will sold."

It will be noted that the statement is twice made in this regulation that good will can be realized on only by

a *sale* of the business to which it attaches. This recognizes and emphasizes the fact that good will is inseparable from a business, and is indivisible and incapable of distribution in kind or of being realized upon in parcels. It is non-existent apart from a going business. This clearly appears from the nature of good will itself.

In 1 Bouv. Law Dict. 888, good will is defined as:

> "The benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices."

And in Lindley on Partnership, Wentworth's Ed. 440, quoted in Bouvier, good will is further defined as follows:

> "The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with

a particular house, and it may be so inseparably connected with it as to pass with it, under a will or deed, without being specially mentioned."

It will be noted that under this definition also it is only on the *sale* of a business that its good will has a marketable value.

It has been held that the value of the good will of a business corporation may be taken into account in determining the value of its capital stock for purposes of the capital stock tax imposed on corporations by Congress by the Act of September 8, 1916.

In *Central Union Trust Co.* v. *Edwards,* 282 Fed. 1008, it is held by the District Court of the Southern District of New York in an opinion by Judge Grubb, as stated in the syllabus, that:

"The tax imposed on corporations by Act. Sept. 8, 1916 (Comp. St. 5980a), is not a property tax, but an excise imposed on the privilege of doing business in corporate form as a going concern, and in measuring the value of its capital stock for purposes of the tax the good will of the corporation, its favorable contracts, amount of business done, and its profitable character are elements to be taken into consideration, as well as the value of its tangible property, less its debts."

On writ of error in the above case to the Circuit Court of Appeals, the judgment of the District Court was affirmed. *Central Union Trust Co.* v. *Edwards,* 287 Fed. 324.

The court in the opinion defines the phrase "the fair value of its capital stock" as used in the act to include good will.

The question under consideration is stated by the Court as follows:

> "Thus the formal question at bar is, What did Congress mean by 'the fair value of its capital stock,' as applied to a company of which its shareholders think so highly that they regard each share as worth nearly twice what they would get for it on liquidation in accordance with honestly and intelligently kept books?"

Further in discussiong the authorities, the Court says:

> "In Ohio, also, the Supreme Court found without objection that the state scheme regarded 'capital stock' as representing, 'not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern.' *Adams. etc. Co.* Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965."

The Court concludes and holds that good will of a business corporation is properly taken into account in determining the value of its capital stock for purposes of imposing the capital stock tax.

The evidence in the instant case without dispute shows that stock in the Osage Mercantile Company had a good will value of at least $100.00 per share at March 1, 1913, in addition to its tangible asset or book value as

determined by the Commissioner. The test of the March 1, 1913, value of any property as prescribed by the Revenue Act of 1918 is its fair market price or value on that date, and hence under the evidence in the instant case the fair market price of the stock on March 1, 1913, was $356.86 book value, plus $100.00 good will value, or $456.86. It is conceded that the stock had the same good will value at the time of the liquidation in 1920, but it is contended that the good will of a business corporation, being an intangible asset, is not susceptible of division and distribution among its stockholders on liquidation where its business and assets are not sold, but are distributed *in specie* or in kind to its stockholders. If the Osage Mercantile Company had sold its business and tangible assets, along with the lots and building where its business was conducted, in bulk and as a unit, then its good will asset would have passed in the sale to the purchaser. But this it did not do. Instead it liquidated by disbursing its assets in kind to its stockholders. By this method of liquidation each stockholder received out of the corporation's specific personal property, consisting of merchandise, furniture and fixtures, notes and accounts, etc., the proportion or share thereof to which his stockholdings entitled him. The location or place of the business, the lots and building, was not owned by the corporation, but was occupied by it as lessee, and hence it

could not distribute its good will incident to its place of business to the stockholders in liquidation.

It is contended that good will is necessarily attached to a business as a whole and cannot be subdivided and split up so that each of two or more persons may receive a moiety thereof. It is further contended that, unless in the distribution of the corporation's assets at liquidation a stockholder receives money or property that is distinct and separate from the interests of all other persons, so that he may handle it as he chooses and have it subject only to his exclusive control and use, he does not receive taxable income. Obviously good will cannot be thus subdivided and distributed among individuals, but must exist as a whole and pertain to a business existing and continuing as a unit.

Income is defined as the "gain derived from capital, from labor, or from both combined." *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415, 34 Sup. Ct. 136, 140, 58 L. Ed. 285; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185, 38 Sup. Ct. 467, 469, 62 L. Ed. 1054; *Eisner* v. *McComber,* 252 U. S. 189, 207, 40 Sup. Ct. 189, 193, 64 L. Ed. 521, 9 A. L. R. 1570. But not all gain so derived, though constituting income in a sense, is taxable income. Before income can be taxable to an individual it must be segregated and set apart to him, removed from the con-

trol of other persons and placed entirely under his individual control. This is well illustrated by the case of the accumulation of undistributed profits by a corporation. All gain derived by a corporation is gain derived by its stockholders, because the assets of a corporation belong to them by virtue of their stock, yet the gain derived by a stockholder from the fact that the corporation is earning large profits is not taxable income to him. This is well expressed in *Eisner* v. *Macomber, supra,* 209, as follows:

> "If profits have been made and not divided they create additional bookkeeping liabilities under the head of 'profit and loss,' 'undivided profits,' 'surplus account' or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only, (excluding, of course, a possible advantageous sale of his stock or winding up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested."

In administering the various revenue acts the Commissioner of Internal Revenue has consistently ruled

that if a taxpayer's right to receive property was conditional or incomplete and such property did not come into his possession with full power of disposal, it was not taxable income. On this point the following from Article 53, Regulations 45, is submitted:

> "Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until the termination of five years of employment, the mere crediting on the books of the corporation does not constitute receipt. The distinction between receipt and accrual must be kept in mind. Income may accrue to the taxpayer and yet not be subject to his demand or capable of being drawn on or against by him."

In the instant case the assets of the Osage Mercantile Company were distributed one-half to the petitioner and one-half to his brother, R. W. Tucker. The distribution was in property consisting of merchandise, furniture and fixtures, accounts, etc. Each one took a half interest in this property. The good will was not subject

to division in two parts or to assignments of one-half thereof to each of them. Upon liquidation of the corporation they formed a partnership and each contributed to its capital his undivided half interest in the property received from the corporation. If it be argued that the partnership, when formed succeeded to the good will of the corporation, still the petitioner never realized anything on the good will value of his stock, for, as we have seen, the good will could not be subdivided and one-half thereof assigned to him subject to sale or other disposal by him. This in the nature of things was impossible. Good will cannot be divided and sold or disposed of in parcels. If the good will passed as a whole to the partnership, then the petitioner had nothing more than an undivided half interest therein which he could not separate or withdraw from the business and could not sell or dispose of at his pleasure. He might force a dissolution or liquidation of the partnership, but in such event the good will value would be lost. The only possible way for him to obtain anything for it would be for the partnership business to be sold as a whole, including good will. This he alone could not bring about, because it would require the concurrence of his partner in such sale. Neither could he sell out his interest in the partnership to a third person, who might come into it and take his place, and so realize on the good will value. Such an

arrangement would mean the dissolution of the existing partnership and the formation of a new one. This could be done only with the consent of the other partner. And if either of these things were done, then only and for the first time would he realize something of value separately and exclusively his and subject to his control and disposal. In fact the record shows the petitioner never realized on the alleged good will by either of the methods mentioned (R. 21-22). Consequently in no view of the matter can it be said that he received or realized in his possession and under his control and as his separate and exclusive property anything of value out of the good will of the corporation at the time of liquidation. The most he could be said to have received would be a right to half the benefits of the joint use of it without power to dispose of it.

In *U. S.* v. *Phellis, supra,* the stock there under consideration was said to be income because it was "received or drawn by the claimant for his separate use, benefit, and disposal," and again because it was drawn by the stockholders "severally for their individual and separate use and benefit." It is also said that the stock "was capable of distribution as the manufacturing assets whose place it took were not."

In the instant case the good will under consideration

was not something drawn by the petitioner for his separate use, benefit and disposal. Like the manufacturing assets above referred to, it was not capable of distribution. All he had was a joint interest with another in an intangible and evanescent property right, absolutely incapable of partition, which, upon the contingency of a sale, concurred in by his co-owner, in conjunction with the tangible property to which it was attached, part of which, the place of the business, neither of them owned or controlled, might be converted into money or tangible property capable of being drawn to his separate use, benefit and disposal. Only in that event if it had come to pass, could he be said to have realized anything on the good will value of his stock at liquidation of the corporation.

And in *Rockefeller* v. *U. S., supra*, it is said that the stock under consideration "was capable of division among stockholders as the pipe line properties were not," and that it constituted "actual exchangeable assets transferred to him * * * for his separate use." Like the pipe line properties the good will under consideration was not capable of division among the stockholders. Neither after liquidation did it constitute an actual exchangeable asset transferred to the petitioner for his separate use.

If the first specification of error is sustained, this one is immaterial to a decision of the case. If the first be not sustained and this one be sustained, then the judgment of the District Court should be reversed and the cause remanded with directions to that Court to redetermine the plaintiff in error's tax liability on the basis of $203.71 tangible assets value and $100.00 good will value, or $303.71 full value, per share at March 1, 1913, to be deducted from the amount realized at liquidation of the company in 1920 of $319.46 per share, leaving a net taxable gain per share of $15.75.

FOURTH SPECIFICATION OF ERROR.

This specification of error relates to the action of the trial court in refusing to enter judgment for the amount of tax admitted to be refundable, in the sum of $216.26 and interest, and for the costs of the action. It must be borne in mind that the petitioner paid the additional tax in the sum of $8,610.84, in which was included the $216.26 in question, under protest, and after notice and demand by the Collector, and under threat of penalty, if not paid within ten days after such notice (R. 49). The date of payment was October 30, 1923 (R. 50). Three days later, November 2, 1923 (R. 51-52), he filed with the Commissioner his claim

for refund of the tax in question. After the Commissioner had held this claim without action thereon one way or the other for almost a year, the petitioner filed this suit, October 7, 1924 (R. 2). More than six months after the suit was filed and more than two months after the issues were joined therein, and while the case was awaiting assignment for trial, the Commissioner, on April 24, 1925, issued his letter (R. 54-55) admitting that an illegal and excessive tax in the sum of $216.26 had been collected and allowing a refund for that amount, but rejected the claim for the balance. This was a confession of the petitioner's cause of action to the extent of the sum named. It must be conceded that his action was rightfully brought, and that under it he was entitled to recover such part of the amount claimed, though less than all, as might be admitted or judicially determined to have been erroneously and illegally assessed and collected. We know of no rule of law by which defendant, after suit brought and issue joined by a denial of liability, can then come into court and, by admitting that he owes a part of the amount sued for and offering to pay the same, be thereby relieved of a judgment against him for costs. And not only that, but even have judgment against him in any sum denied merely upon his promise that he would at some convenient time pay the amount admitted to be due. It must be borne in mind

that the respondent's answer of general denial was filed on February 9, 1925, or two and one-half months before the date of the Commissioner's letter allowing the amount of refund in question, and that no tender of that amount was ever pleaded in the case or paid into court, but the cause went to trial upon the petition of the plaintiff claiming a recovery and a general denial of all liability on the part of the defendant. In fact this admitted liability never got into the case at all until the petitioner offered evidence of it on the trial, and then counsel for the defendant in error objected vigorously to it and to a judgment for the amount admitted to be due because that would "carry costs with it," and because "the Department ought not to be penalized for costs on this" (R. 53-54). If there is any authority which would uphold a judgment against the plaintiff for costs and against his recovery of any sum, notwithstanding a confessed liability to him, we do not know of it or where it can be found. None was presented in the trial court. Upon what theory the trial court acted is not disclosed and we do not know.

The jurisdiction of the court rests upon Section 24 (5) of the Judicial Code, for the case arises under a law providing for internal revenue, and the amount involved or the amount of the recovery is immaterial.

It is clear that Section 968, Revised Statutes, does not apply, for jurisdiction is in no manner dependent on the amount in controversy.

The Circuit Court of Appeals said that if the petitioner "had based his suit upon any ground contained in the claim," and if the $216.26 "had been all or a part of the sum claimed under such ground," then he would have been entitled to a judgment for such sum and costs, but that, since "no refund of the above sum could have been secured" under his petition and the suit had nothing to do with procuring the refund, he had no right to his costs (R. 87)." In this the Circuit Court of Appeals has misunderstood the facts. The refund of said sum resulted from the reduction of the value of the assets of the Osage Mercantile Company at liquidation in 1920 from $97,292.71, as first fixed by the Commissioner (R. 4), to $95,825.79, by reason of a larger outstanding tax liability of the corporation, which was paid by the stockholders after liquidation, than the Revenue Agent and the Commissioner had estimated and used in their calculations (R. 17-19, 57-58). This precise ground was alleged in the claim for refund and upon it the said refund was allowed (R. 54-55), and this precise ground for recovery is alleged in the petition in the suit (R. 4), although the petitioner there alleged a larger amount of such outstanding liabilities than the proof showed at

the trial. So if the Circuit Court of Appeals had correctly grasped the facts on this point, then under its expressed view of the law the judgment of the trial court should have been reversed and a judgment directed for the petitioner for $216.26 and costs.

Attention is called to Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, which provides that no suit or proceeding for the recovery of any internal revenue tax shall be maintained until a claim for refund has been filed with the Commissioner, and further provides that: "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time." This statute plainly implies that after a taxpayer's claim for refund has been rejected, or after it has been held by the Commissioner for six months without a decision thereon, then there is no restriction or inhibition of his right to bring suit, but he is at liberty to proceed at once to do so. In the instant case the petitioner waited practically a year for the Commissioner to render a decision on the claim for refund before filing suit and then the Commissioner waited six months after suit was filed before he did render a decision. We know of no law and of no principle of reason or fairness that could justify penalizing the petitioner for costs of the

suit, which he had a right to bring, simply because he did not wait until the Commissioner, in his own good time and at his own sweet pleasure, should render a decision on the claim for refund. He had waited a year. He had no way of knowing whether a decision would come in six months, or twelve months, or years afterwards. The event proved that it did not come for more than six months after suit was filed.

If the first specification of error is sustained, then this one becomes immaterial, for judgment will have to be rendered for the plaintiff in error for an amount to be computed, which will be a little less than the $6,642.13 claimed, but will include this item of $216.26.

If neither the first nor the third specifications of error is sustained, then this one should be, and the case be remanded with directions to the trial court to enter judgment for the petitioner for $216.26 with interest at six per cent from October 30, 1923, and costs of the action.

CONCLUSION

In conclusion the petitioner says that the judgment of the Circuit Court of Appeals is reversible upon each of the five assignments of error which he has made in respect thereto and that it should be reversed on

each of the first four of said assignments. He says further that the judgment of the trial court is reversible upon each of the four specifications of error in respect thereto as above considered, and that it should be reversed upon the first and second of such specifications and the cause remanded with directions to enter judgment for the petitioner as plaintiff in the action for the sum of $6,642.13, with interest at 6% per annum from October 30, 1923, and the costs of the action.

Respectfully submitted,

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